

STATE SOVEREIGN IMMUNITY AND THE FUTURE OF FEDERALISM

The states are winning more federalism cases at the Supreme Court these days than at any time since the New Deal. Important decisions have reinvigorated limits on the federal commerce power,¹ imposed clear statement rules for a variety of congressional impositions on state authority,² and crafted new limits on the ability of the federal government to “commandeer” state instrumentalities.³ But the Court’s most persistent and aggressive efforts have focused on the arcane doctrine of state sovereign immunity.⁴ In

Ernest A. Young is Assistant Professor, University of Texas School of Law.

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¹ *United States v. Lopez*, 514 US 549 (1995). The Court has also recognized limits on Congress’s power to enforce the Fourteenth Amendment. See *City of Boerne v. Flores*, 521 US 507 (1997).

² *Gregory v. Ashcroft*, 501 US 452 (1991); *Will v. Michigan Dept. of State Police*, 491 US 58 (1989). The most important of these “clear statement” rules—the presumption against preemption of state regulatory authority—is not new, having been around since the New Deal. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 US 218 (1947); Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L Rev 767, 805–07 (1994).

³ *Printz v. United States*, 521 US 898 (1997).

⁴ In addition to the cases cited in notes 1–3, see also *Idaho v. Coeur d’Alene Tribe*, 521 US 261 (1997) (holding that the Eleventh Amendment barred a suit for declaratory and injunctive relief against state officials based on a claim of ownership of certain submerged lands); *Regents of the University of California v. Doe*, 519 US 425 (1997) (holding that the federal government’s obligation to indemnify a state agency did not divest the agency of Eleventh Amendment immunity). Not all the Court’s recent Eleventh Amendment decisions have gone in favor of the states. See, e.g., *Wisconsin Dept. of Corrections v. Schacht*, 524 US 381 (1998) (presence of claims barred by Eleventh Amendment did not divest federal court, upon removal, of jurisdiction to hear remaining claims); *California v. Deep Sea Research*, 523 US 491 (1998) (Eleventh Amendment did not bar federal jurisdiction over an *in rem*

1996, the Court rejected the then-prevailing view that Congress, when acting pursuant to its Article I powers, may abrogate the states' Eleventh Amendment immunity from suit in federal court.⁵ Last Term, in *Alden v Maine*,⁶ the Court took the next step by holding that Congress likewise could not abrogate state sovereign immunity in the states' own courts. And the two companion *College Savings Bank* decisions—handed down the same day as *Alden*—took a narrow view of the Congress's only remaining abrogation power under Section 5 of the Fourteenth Amendment.⁷

Concluding the last full Supreme Court Term of the century with the Eleventh Amendment has a certain aesthetic appeal; after all, the Court's other most notable forays into state sovereign immunity were likewise fin de siècle phenomena.⁸ But one does not have to be a nationalist to think that the Rehnquist Court's state sovereign immunity jurisprudence marks an unfortunate turn for federalism doctrine. Even those of us who consider ourselves federalism "hawks"—who applauded *United States v Lopez*,⁹ for example, for reinvigorating the idea of limited federal powers, and who look to the Court for some restoration of a federal-state balance thrown badly out of joint by the New Deal—need not think that all protections for states' rights are equally helpful. And sovereign immunity, to put it plainly, is a poor way to protect state prerogatives in a federal system.¹⁰

It may help to start with a framework for comparing different federalism doctrines. The federalism cases of the last half century can usefully be grouped into three rough models of federalism jurisprudence:

admiralty suit where the state did not possess the res in question); *Hess v Port Authority Trans-Hudson Corp.*, 513 US 30 (1994) (bi-state railway created by interstate compact was not entitled to Eleventh Amendment immunity). But these cases do illustrate the Court's apparent fascination with the Eleventh Amendment.

⁵ *Seminole Tribe of Florida v Florida*, 517 US 44 (1996), overruling *Pennsylvania v Union Gas Co.*, 491 US 1 (1989).

⁶ 119 S Ct 2240 (1999).

⁷ *College Savings Bank v Florida Prepaid Postsecondary Education Expense (CSB I)*, 119 S Ct 2219 (1999); *Florida Prepaid Postsecondary Education Expense v College Savings Bank (CSB II)*, 119 S Ct 2199 (1999).

⁸ See *Hans v Louisiana*, 134 US 1 (1890); *Chisolm v Georgia*, 2 US (2 Dall) 419 (1793).

⁹ 514 US 549 (1995).

¹⁰ For a similar view, see Charles Fried, *Supreme Court Folly*, New York Times A17 (July 6, 1999).

- “Process” federalism, which relies upon the states’ representation in Congress as the primary means of protecting state sovereignty, and envisions judicial intervention only to ensure that this process is functioning properly;¹¹
- “Power” federalism, which seeks to articulate substantive limits on federal power, particularly on Congress’s power to supplant state regulatory authority by regulating private conduct directly;¹² and
- “Immunity” federalism, which protects state governments themselves from direct molestation at the hands of the federal government, but does little to protect the ability of the states to act as authoritative regulatory entities in their own right.¹³

These categorical distinctions are not perfectly clean. The anti-commandeering cases,¹⁴ for example, partake of more than one model. But these categories do provide a useful tool for assessing the Court’s federalism priorities.

The Rehnquist Court’s federalism jurisprudence, I contend, displays a misplaced and potentially counterproductive propensity toward immunity federalism. As James Madison recognized in *The Federalist* 45 and 46, the states’ ultimate security lies in the confidence of the people. That confidence expresses itself through the political process (hence the importance of process federalism) but ultimately turns upon the continuing relevance of state governmental institutions to the day-to-day lives of the citizenry. The greatest danger to federalism, therefore, is that the expanding regulatory concerns of the national government will leave the states with nothing to do.

With this core interest firmly in mind, we can evaluate federalism models in general and last Term’s federalism decisions in particular. In terms of the sheer volume of state regulatory “turf” at stake, the biggest federalism case of last year was not *Alden*, not *College Savings Bank*, but *AT&T Corp. v Iowa Utilities Board*,¹⁵ which

¹¹ See, e.g., *Garcia v San Antonio Metro. Transit Auth.*, 469 US 528 (1985); *Gregory v Ashcroft*, 501 US 452 (1991).

¹² See, e.g., *United States v Lopez*, 514 US 549 (1995).

¹³ See, e.g., *Seminole Tribe of Florida v Florida*, 517 US 44 (1996).

¹⁴ See *Printz v United States*, 521 US 898 (1997); *New York v United States*, 505 US 144 (1992).

¹⁵ 119 S Ct 721 (1999).

interpreted the Telecommunications Act of 1996 to oust state regulatory authority over local telephone service—a core state regulatory function for the past 100 years. Although the case was a close one on the merits, it could easily have gone the other way based on familiar process federalism doctrines, such as the presumption against preemption of state law. That “might have been” illustrates the continuing—but neglected—potential of process theory to make meaningful contributions to federalism doctrine.

The cases that the Court did decide on federalism grounds—*College Savings Bank* and *Alden*—were both sovereign immunity cases. But *College Savings Bank* was primarily about the scope of Congress’s legislative power under Section 5 of the Fourteenth Amendment (a legitimate exercise of that power being a prerequisite for valid abrogation of state sovereign immunity after *Seminole Tribe*). By rejecting Congress’s attempt to support the Lanham and Patent Acts under Section 5, the Court ensured that the Fourteenth Amendment’s protection of property rights could not be leveraged into a virtually unlimited tool for regulating commercial interests. *College Savings Bank* is thus best thought of as a “power federalism” decision that directly protects state regulatory prerogatives.

Alden, on the other hand, was a pure immunity case. And immunity federalism does little to ensure the states’ continuing relevance. It is nice not to be subject, say, to private copyright suits, but it seems unlikely that many states have plans to set up a bootleg recording operation. And because the states remain subject to the commands of federal law, through its moral suasion, through suits against state officers for prospective relief, and the possible threat of a direct suit brought by the United States, the ultimate benefits of immunity seem limited at best.

Immunity may, on the other hand, be counterproductive in at least three ways: First, immunity decisions striking down federal attempts to subject the states to private suit may squander the Court’s political capital, thereby undermining its ability to pursue a (more useful) process or power federalism model. Second, recognition of immunity from private suit may encourage Congress to subject the states to other, more intrusive means of ensuring compliance with federal law. Third, reducing state accountability to federal requirements may reduce Congress’s inclination to devolve

significant regulatory authority to state governments, much in the same way that elimination of the legislative veto threatened to undermine Congress's willingness to delegate authority to administrative agencies.

A final reason to worry about the Rehnquist Court's direction on federalism issues is the Court's inability to forge a consensus that can attract more than five votes. In many ways, we seem to be seeing "payback" for the *Garcia* decision in 1986, in which five liberal Justices dramatically cut back on judicial review of federalism issues over the vigorous dissent of four more conservative Justices who vowed not to accept that result as legitimate. Now the four Justices whom it seems fair to characterize as "nationalist"—Justices Stevens, Souter, Ginsburg, and Breyer—essentially refuse to accept the result in *Seminole Tribe*, promising another dramatic shift in the event of a fifth nationalist appointment to the Court. What is totally lacking is any effort, by either side, to construct a reasoned middle ground that could, by attracting support from both camps, hope to serve as a stable framework for federalism despite the inevitable future shifts in court personnel. This failure is particularly unfortunate because the uncertain outcome of the next presidential election provides a temporary "veil of ignorance" behind which each side ought to recognize incentives to compromise.

In this article, I offer a critique of the Court's state sovereign immunity decisions from a perspective that is highly sympathetic to states' rights and interests. It is important, however, to be clear at the outset as to several things that I am *not* attempting to do:

First, I am not mounting a general defense of federalism. Although the notion that federalism is worth reviving, preserving, or extending is certainly not uncontroversial,¹⁶ one cannot manageably fight every battle in one article. For today, I wish to focus on a narrower question: Assuming that federalism is a good idea, is the Court's state sovereign immunity jurisprudence a sensible strategy for advancing federalist values?

¹⁶ Compare, e.g., Edward L. Rubin and Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L Rev 903 (1994) (just like it sounds), with Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?* 111 Harv L Rev 2180, 2217–23 (1998) (refuting the Rubin and Feeley position).

Second, my focus is not primarily on the *merits* of the Court's sovereign immunity decisions. While those issues are fascinating, many of them have been rather thoroughly vetted elsewhere—not least in the comprehensive opinions of the Justices themselves.¹⁷ The primary question here is one of strategy and of the relation of means to ends. Which broad model of federalism doctrine, in other words, makes the most sense as a vehicle for strengthening the states' role in the system?

Third, while I argue for a power-based model of federalism (complemented by process doctrines insofar as they also protect state regulatory power), I do not seek to advance a general theory for implementing and defining such a model here. I do suggest, in the last part, that a dual sovereignty theory might both support a reasonable set of federalism priorities and attract a centrist coalition of Justices. But the scope of the present project does not permit anything more than a tentative suggestion.

My exploration of these issues proceeds in six parts. Part I surveys the Court's sovereign immunity jurisprudence, focusing on the Court's recent decisions in *Alden* and *College Savings Bank*. Part II develops a framework for evaluating federalism doctrine by elaborating three distinct categories or approaches: process federalism, power federalism, and immunity federalism. Parts III, IV, and V focus on the Court's recent endeavors in each of these categories. In particular, I argue that process and power federalism are more promising than immunity federalism, and that for this reason *Alden* is likely to be unhelpful to the states, while *College Savings Bank* offers some promise. Finally, Part VI surveys the unfortunate cycle of the Court's federalism jurisprudence and the prospects for a lasting compromise.

¹⁷ The essential literature on the general issue of abrogation includes Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 Supreme Court Review 1; Lawrence Marshall, *Fighting the Words of the Eleventh Amendment*, 102 Harv L Rev 1342 (1989); Vicki Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L J 1 (1988); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L J 1425 (1987); William Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 Stan L Rev 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum L Rev 1889 (1983). On sovereign immunity in state court, see Ellen D. Katz, *State Judges, State Officers, and Federal Commands After Seminole Tribe and Printz*, 1998 Wis L Rev 1465; Carlos M. Vazquez, *What Is Eleventh Amendment Immunity?* 106 Yale L J 1683 (1997). On the general history of state sovereign immunity, see John Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* (1987).

I. STATE SOVEREIGN IMMUNITY AT MILLENNIUM'S END

The Court's state sovereign immunity jurisprudence is frequently convoluted, contradictory, and obscure. It is, in other words, something only a law professor could love. Because my purpose here is to situate the Court's immunity jurisprudence in the broader context of federalism doctrine rather than to offer a doctrinal critique, I will attempt only a brief outline of how we arrived at our present troubles.

A. WHAT HAD GONE BEFORE

The Eleventh Amendment was ratified in 1795 as a response to the Court's decision in *Chisolm v Georgia*.¹⁸ *Chisolm* held that Article III's provision for federal diversity jurisdiction over suits between a state and a citizen of another state had effectively abrogated the sovereign immunity from suit that the states had enjoyed at common law. Based on this reasoning, the Court exercised jurisdiction over a suit brought by a private individual against the State of Georgia to collect a debt. At this time many, if not all, the states were heavily indebted on loans arising from the Revolutionary War, and the *Chisolm* decision accordingly aroused widespread and ferocious opposition.¹⁹ The resulting constitutional amendment firmly rejected *Chisolm*'s holding by providing that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."²⁰

One might plausibly take either of two positions on what this text means. Most commentators—and apparently all the members of the current Court—have accepted the “diversity” view, that is, that the text of the Eleventh Amendment simply repeals the state-citizen diversity clause of Article III for all cases in which the state is a defendant.²¹ Others have advanced a “plain meaning” theory,

¹⁸ 2 US (2 Dall) 419 (1793).

¹⁹ See Orth, *The Judicial Power of the United States* at 7 (cited in note 17); Fletcher, 35 Stan L Rev at 1058 (cited in note 17).

²⁰ US Const Amend XI.

²¹ See, e.g., *Seminole Tribe of Florida v Florida*, 517 US 44, 54 (1996); *Pennsylvania v Union Gas Co.*, 491 US 1, 31 (1989) (Scalia concurring in part and dissenting in part); and Jackson, 98 Yale L J at 44–51; Fletcher, 35 Stan L Rev at 1035–37; Amar, 96 Yale L J at 1481–82 (all cited in note 17).

under which the Eleventh Amendment would bar federal jurisdiction wherever state-citizen diversity exists, regardless of whether some other ground—such as a federal question in the suit—might also support jurisdiction in the case.²² Under the diversity theory, the Eleventh Amendment would never bar federal jurisdiction in federal question suits. Under the plain meaning theory, in-staters could bring federal question suits against states but out-of-staters could not.²³

This debate over the proper reading of the Eleventh Amendment's text is interesting but largely academic. The real action in this area has concerned the Court's steady and relatively candid expansion of state sovereign immunity beyond the Amendment's textual scope. The most important step in this saga occurred in *Hans v Louisiana*,²⁴ in which the Court held a state immune from suit on a Contract Clause claim—a federal question claim, arising under the Federal Constitution—brought by an in-stater. *Hans* rested in part on the apparent anomaly of allowing out-of-staters to bring federal question suits against a state but not in-staters, and in part on a generalized principle of sovereign immunity based on scattered comments from the Framers and the immunity doctrines of English common law. As the Court later explained in *Principality of Monaco v Mississippi*,

Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention."²⁵

²² See Marshall, 102 Harv L Rev at 1346 (cited in note 17).

²³ See generally *Seminole Tribe of Florida v Florida*, 517 US 44, 109–16 (1996) (Souter dissenting) (discussing the two competing textual theories).

²⁴ *Hans v Louisiana*, 134 US 1 (1890).

²⁵ 292 US 313, 322–23 (1934) (quoting Federalist 81, at 487). *Monaco* implemented this understanding by holding that the states' immunity extends to suits by foreign sovereigns (not simply by their "citizens" or "subjects"), id at 330, and the Court followed up by extending the immunity beyond suits "in law or equity" to cover suits in admiralty in *Ex parte New York*, 256 US 490 (1921). See also *Blatchford v Native Village of Noatak*, 501 US 775 (1991) (extending the immunity to suits brought by Indian tribes).

Monaco's “postulates which limit and control” had assumed such a dominant role in Eleventh Amendment doctrine by 1996 that Chief Justice Rehnquist was able to dismiss an argument grounded in the text as a “straw man.”²⁶

The extension of state sovereign immunity to federal question cases threatened drastically to curtail the enforceability of federal rights against state governments. *Hans* and its progeny thus inspired three sets of cases designed to ease this threat.²⁷ The first group of cases, beginning with the Court’s landmark decision in *Ex parte Young*, recognized that the state’s sovereign immunity would not bar a suit against a state officer alleged to be acting in violation of federal law.²⁸ The doctrine that a suit against a state officer is not equivalent to a suit against the state itself has frequently been described as a “fiction,” because court orders issued against officers frequently block state policy, and the state frequently defends such suits itself or reimburses damage awards entered against officers sued in their individual capacity.²⁹ Nonetheless, this “fiction” went hand in hand with the doctrine of sovereign immunity at common law, and it seems doubtful that the latter doctrine would have taken the broad form that it took absent the moderating influence of the officer remedy.³⁰ Subsequent cases have limited the officer remedy, however, by making

²⁶ *Seminole Tribe of Florida v Florida*, 517 US 44, 69 (1996). But see *id.* at 116 n 13 (Souter dissenting) (replying that “plain text is the Man of Steel in a confrontation with ‘background principle[s]’ and ‘postulates which limit and control’”).

²⁷ Contemporaneously with *Hans*, the Court had recognized another important limit on the scope of state sovereign immunity by refusing to extend that immunity to local governments. See *Lincoln County v Luning*, 133 US 529 (1890).

²⁸ 209 US 123 (1908). The Court had recognized that the sovereign immunity of the United States would not bar a suit against a federal officer even earlier, in *United States v Lee*, 106 US 196 (1882).

²⁹ See *Idaho v Coeur d’Alene Tribe*, 521 US 261, 272 (1997) (plurality opinion); Laurence H. Tribe, 1 *American Constitutional Law* § 3–27, at 558 (Foundation Press, 3d ed 2000) (describing the distinction between suits against states and suits against officers as “unsatisfactory and conceptually unruly”).

³⁰ See, e.g., *Coeur d’Alene*, 521 US at 308 (Souter dissenting); Tribe, 1 *American Constitutional Law* § 3–27, at 557–58 (cited in note 29) (describing the historical lineage and practical necessity of the *Young* doctrine); Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* 1015–16 (Foundation Press, 4th ed 1996) (“*Hart & Wechsler*”) (suggesting that, in light of the historic availability of officer suits, the real “fiction” may be the proposition “that there ever existed a broad doctrine of sovereign immunity that, outside of a few specific areas, barred relief at the behest of individuals complaining of government illegality”).

clear that only *prospective* relief may be had against state officials sued in their official capacity.³¹

The second set of cases—which actually predated *Hans*—held that a state may waive its sovereign immunity to suit notwithstanding the fact that the Eleventh Amendment itself is phrased as a limitation on federal subject matter jurisdiction.³² The doctrine permitting express waiver has been relatively uncontroversial, although the Court has limited that doctrine by requiring that waivers be unmistakably clear³³ and by holding that a state may waive its immunity in its own courts without also waiving immunity to federal court suits.³⁴ The Court’s “constructive waiver” cases have been more contested. Under the constructive waiver doctrine, a state that engages in an activity regulated by federal law waives its immunity to suits brought under the federal regulatory scheme.³⁵ The Court had already narrowed this doctrine considerably by the time it revisited the issue in *CSB I*.³⁶

The final set of cases—and the ones which have preoccupied the Court in recent years—involve Congress’s authority to abrogate the states’ sovereign immunity and subject them to suit under federal law. The two landmarks are *Fitzpatrick v Bitzer*,³⁷ which held that Congress could subject the states to federal court suits when Congress acts pursuant to its power to enforce the Reconstruction Amendments, and *Pennsylvania v Union Gas Co.*,³⁸ which recognized a similar abrogation power when Congress acts under its general Commerce Clause authority. Abrogation is a counterintuitive proposition; indeed, the proposition that Congress *cannot* abrogate constitutional restrictions on its power is the very founda-

³¹ See *Edelman v Jordan*, 415 US 651 (1974). Individual officers may be sued for damages in their personal capacity, but a plaintiff may not reach the state treasury through such a suit. See *Hart & Wechsler* at 1124 (cited in note 30).

³² See, e.g., *Clark v Barnard*, 108 US 436, 447–48 (1883). Subject-matter limitations are not ordinarily subject to waiver by the parties to a suit. See *Mansfield, Coldwater & Lake Michigan Ry. v Swan*, 111 US 379 (1884).

³³ *Atascadero State Hosp. v Scanlon*, 473 US 234, 241 (1985); *Pennhurst State School and Hosp. v Halderman*, 465 US 89, 99 (1984).

³⁴ See *Smith v Reeves*, 178 US 436, 441–45 (1900).

³⁵ See *Parden v Terminal Railway*, 377 US 184 (1964).

³⁶ See *CSB I*, 119 S Ct 2219, 2226–27 (1999) (surveying the post-*Parden* case law).

³⁷ 427 US 445 (1976).

³⁸ 491 US 1 (1989).

tion of constitutional law. The Court's abrogation cases have explained this anomaly in two quite different ways.

The *Fitzpatrick* approach emphasized the unique nature of Congress's power under Section 5 of the Fourteenth Amendment. "When Congress acts pursuant to § 5," the Court said, "not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."³⁹ This somewhat ambiguous language might be taken to mean (a) that the ratification of the Fourteenth Amendment in 1868 amended the Eleventh Amendment simply because it was later in time, (b) that the broad intent of the Reconstruction Amendments was to create a general exception to federalism limitations on federal power, or (c) that Section 5's specific textual grant of power to "enforce" federal civil rights necessarily includes the power to impose a damages remedy. But regardless of which rationale one prefers, the important point is that *Fitzpatrick*'s approach is not generalizable to congressional action under other enumerated powers.

Union Gas took a broader approach. Although Justice Brennan's plurality opinion attempted to track *Fitzpatrick* by analogizing the commerce power to the Section 5 power,⁴⁰ that reasoning drew few adherents.⁴¹ The more persuasive rationale was offered in Justice Stevens's concurrence, which began with the observation that we have "two Eleventh Amendments."⁴² The first is the textual provision itself, while the second is the broader immunity recognized by the Court in *Hans v Louisiana*. Justice Stevens suggested that the latter sort of immunity must be a form of federal common law—a default rule which would bar suit in most cases but which

³⁹ *Fitzpatrick*, 427 US at 456.

⁴⁰ See 491 US at 19–20 (plurality opinion).

⁴¹ Justice White, who provided the fifth vote in *Union Gas*, said that "I agree with the conclusion reached by Justice Brennan . . . , that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning." *Id.* at 57 (White concurring in the judgment in part and dissenting in part). Unfortunately, Justice White chose not to explain what rationale he found convincing. The dissenters in *Seminole Tribe* made no attempt to revive Justice Brennan's rationale or—given Justice White's eccentric performance—to rely on *Union Gas* as a matter of stare decisis.

⁴² 491 US at 23 (1989) (Stevens concurring).

Congress could necessarily override by duly enacted legislation.⁴³ On this theory, abrogation would not involve the “override” of any constitutional restriction on Congress’s power, but rather the uncontroversial proposition that judge-made federal common law rules are subject to modification at Congress’s discretion.⁴⁴

The Court’s 1996 decision in *Seminole Tribe v Florida* rejected this reasoning and held that the immunity recognized in *Hans*, although broader than the text of the Eleventh Amendment itself, was nonetheless of constitutional stature. The Court thus overruled *Union Gas* and held that Congress may not abrogate state sovereign immunity when Congress acts pursuant to its general Article I powers. *Seminole Tribe* set the stage for last Term’s decisions in *Alden* and *College Savings Bank* by appearing to leave open at least two methods of abrogating state sovereign immunity. First, Chief Justice Rehnquist’s majority opinion in *Seminole Tribe* expressly reaffirmed the Court’s earlier holding in *Fitzpatrick* (also authored by then-Justice Rehnquist) that Congress may abrogate state sovereign immunity when it acts pursuant to its enforcement power under Section 5 of the Fourteenth Amendment. *College Savings Bank* would deal with the contours of that remaining abrogation power. Second, *Seminole Tribe* did little to cast doubt on the assumption that Eleventh Amendment doctrine implicates only the federal courts—the Amendment’s text, after all, discusses only the “Judicial power of the United States.” As Carlos Vazquez noted at the time, however, there was language in *Seminole Tribe* indicating that the majority saw the Amendment as recognizing a broad-based immunity from suit, rather than constituting a mere forum-selection clause.⁴⁵ Professor Vasquez’s prediction came true in *Alden*, where the same majority extended *Seminole Tribe*’s nonabrogation principle to suits in state court.⁴⁶

⁴³ See *id.* at 25 (describing immunity in federal question cases as resting “on a prudential interest in federal-state comity and a concern for ‘Our Federalism’”).

⁴⁴ See, e.g., *Milwaukee v Illinois*, 451 US 304, 313 (1981) (“We have always recognized that federal common law is subject to the paramount authority of Congress.”).

⁴⁵ Vazquez, 106 Yale L.J. at 1702–03 (cited in note 17). See also Katz, 1998 Wis L Rev at 1468 (cited in note 17) (making a similar observation).

⁴⁶ A third route around *Seminole Tribe*—suits against state officers for injunctive relief under *Ex parte Young*—remains open. Although *Seminole Tribe* included ominous signs for *Ex parte Young*, see generally Vicki Jackson, *Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 NYU L Rev 495 (1997), and a subset of the Court’s conservative majority did try significantly to cut back on *Ex parte Young* in *Idaho v Coeur d’Alene Tribe*, 521 US 507 (1997), the officer remedy has come through the latest

B. COLLEGE SAVINGS BANK AND THE SECTION 5 POWER

The two *College Savings Bank* opinions both arose out of a dispute between College Savings Bank, a private bank that marketed specialized certificates of deposit designed to finance the cost of a college education, and the Florida Prepaid Postsecondary Education Expense Board, an arm of the State of Florida that administered a similar program. College Savings Bank sued Florida Prepaid under both the Patent Act⁴⁷ (the bank had patented its methodology for administering the CDs) and the Lanham Act⁴⁸ (for allegedly making misstatements about Florida's own tuition savings plans in its brochures and annual reports).

The Court dealt with these two claims separately in opinions by Justice Scalia and Chief Justice Rehnquist.⁴⁹ In the Lanham Act case, *College Savings Bank I*, Congress had specifically subjected the states to suit in federal court under the Trademark Remedy Clarification Act (TRCA).⁵⁰ As required by the Court's abrogation precedents, the TRCA included a clear statement providing that state defendants "shall not be immune, under the eleventh amendment . . . or any other doctrine of sovereign immunity, from suit in Federal Court."⁵¹ Recognizing that *Seminole Tribe* had not questioned Congress's authority to abrogate state sovereign immunity when acting pursuant to Section 5 of the Fourteenth Amendment, Justice Scalia's majority opinion focused on the question whether the TRCA was a valid exercise of the Section 5 power.

Justice Scalia analyzed this question in light of the Court's decision two terms ago in *City of Boerne v Flores*.⁵² That decision held that Congress's Section 5 power was limited to "remedial" legislation, meaning that "the object of valid § 5 legislation must be the

round of sovereign immunity decisions largely unscathed. See note 301. Congress may also seek in various ways to induce states to waive their sovereign immunity. See text accompanying notes 267–79.

⁴⁷ 35 USC § 271(a).

⁴⁸ 15 USC § 1125(a) (creating a private right of action against "[a]ny person" who uses false descriptions or makes false representations in commerce).

⁴⁹ The cases had been separated because, on appeal, the patent claims went to the Federal Circuit, see 28 USC § 1795(a)(1), while the 11th Circuit handled the Lanham Act claims.

⁵⁰ 106 Stat 3567.

⁵¹ 15 USC § 1122. See, e.g., *Atascadero State Hosp. v Scanlon*, 473 US 234, 243 (1985) ("Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself.").

⁵² 521 US 507 (1997).

carefully delimited remediation or prevention of constitutional violations.”⁵³ *City of Boerne* developed an essentially two-part test: First, the harm addressed by Congress must (in the Court’s own view) be an actual constitutional violation.⁵⁴ Second, there must be “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁵⁵

CSB I focused on the first part of the *City of Boerne* analysis. The bank sought to justify the TRCA as “enforcing” the protection of property rights in Fourteenth Amendment’s Due Process Clause. The Court considered two property interests as candidates for such protection: “(1) a right to be free from a business competitor’s false advertising about its own product, and (2) a more generalized right to be secure in one’s business interests.”⁵⁶ Neither of these asserted interests, Justice Scalia wrote, “qualifies as a property right protected by the Due Process Clause.”⁵⁷ The Court rejected the first interest because a competitor’s false advertising about its own product bore no relationship to the bank’s right to exclude others from *its* property, a “hallmark of a protected property interest.”⁵⁸ And while the bank’s own business no doubt included traditional property interests—such as the bank’s assets—the Court found that the generalized interest in “the activity of doing business . . . is not property in the ordinary sense.”⁵⁹ Because only this generalized interest was affected by a competitor’s false advertising, the Court found no deprivation of property within the meaning of the Fourteenth Amendment.⁶⁰

The Patent Act claims at issue in *CSB II*, on the other hand, clearly involved constitutionally protected property rights. As it had under the Lanham Act, Congress had passed specific legis-

⁵³ *College Savings Bank v Florida Prepaid Postsecondary Education Expense (CSB I)*, 119 S Ct 2219, 2224 (1999).

⁵⁴ *City of Boerne*, 521 US at 519.

⁵⁵ *Id.* at 520.

⁵⁶ *CSB I*, 119 S Ct at 2224.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 2225.

⁶⁰ *Id.* The Court was careful to note, however, that the Lanham Act “may well contain [other] provisions that protect constitutionally cognizable property interests—notably, its provisions dealing with the infringement of trademarks, which are the ‘property’ of the owner because he can exclude others from using them.” *Id.* at 2224.

lation to abrogate state sovereign immunity for Patent Act suits. The bank likewise sought to defend this abrogation legislation, the Patent and Plant Variety Protection Remedy Clarification Act (PRCA),⁶¹ as a valid exercise of Congress's Section 5 power. While acknowledging that "patents may be considered 'property' for purposes of our analysis," however, the Court again found that Congress had exceeded its remedial powers under Section 5.⁶²

Chief Justice Rehnquist's conclusion for the majority rested on two major premises. First, Congress's "remedial" authority depends upon the existence of "a pattern of constitutional violations" by the states.⁶³ Second, patent infringement by a state government violates the Constitution "only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent."⁶⁴ Because the legislative record contained little evidence of either widespread patent violations by states or failures to provide adequate state law remedies for such violations, the Court concluded that "the Patent Remedy Act does not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation."⁶⁵

In addition to the abrogation arguments in both cases, the Court considered in *CSB I*—and rejected—an argument for constructive waiver of the state's Eleventh Amendment immunity. In *Parden v Terminal Railroad Co.*,⁶⁶ the Court had permitted employees of a

⁶¹ 35 USC §§ 271(h), 296(a).

⁶² *Florida Prepaid Postsecondary Education Expense v College Savings Bank (CSB II)*, 119 S Ct 2199, 2208 (1999).

⁶³ *Id* at 2207.

⁶⁴ *Id* at 2208 (citing *Parratt v Taylor*, 451 US 527, 529–31 (1981), and *Hudson v Palmer*, 468 US 517, 532–33 (1984)). The relationship of these two points demonstrates the extent to which the two parts of the *City of Boerne* analysis can run together. The absence of a pattern of constitutional violations seems to go to the second prong, by suggesting that the broad federal remedy was disproportionate to the underlying problem. But the second point—the absence of any showing that the states were failing to provide remedies—suggests that there may have been no constitutional violation in the first place. In light of this second point, *CSB II*'s "pattern" analysis might be read as dictum.

⁶⁵ *Id* at 2210 (quoting *City of Boerne v Flores*, 521 US 507, 526 (1997)). The Court concluded that, rather than responding to a widespread failure to provide adequate state remedies, the Patent Remedy Act was designed to preserve the uniformity of federal patent law by providing a single *federal* remedy. *Id*. The Court acknowledged that uniformity concerns would be a valid basis for legislation under Congress's Article I powers, but found that Section 5 required a higher level of justification. *Id* at 2210–11.

⁶⁶ 377 US 184 (1964).

state-owned railroad to sue the state in federal court under the Federal Employees Liability Act. The Court reasoned that

By enacting the [FELA] . . . Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.⁶⁷

Similarly, the bank argued in *CSB I* that by engaging in the business of providing college savings accounts, Florida had constructively waived its immunity for Lanham Act suits arising out of that business.

By the time the Court sat to decide *CSB I*, the *Parden* doctrine invoked by the bank was hanging by a thread. As Justice Scalia observed, the Court had “never applied the holding of *Parden* to another statute, and in fact [had] narrowed the case in every subsequent opinion in which it [had] been under consideration.”⁶⁸ The idea of constructive waiver, the Court pointed out, is in fundamental tension with cases holding that express waivers of sovereign immunity must be unequivocal;⁶⁹ moreover, “constructive consent is not a doctrine commonly associated with the surrender of constitutional rights.”⁷⁰ In any event, *Parden*’s holding rested on “the notion that state sovereign immunity is not constitutionally grounded”—a notion repudiated in *Seminole Tribe*.⁷¹ The Court thus determined to “drop the other shoe” by expressly overruling “[w]hatever may remain of our decision in *Parden*.”⁷²

Three primary principles emerge from the two *College Savings Bank* opinions:

First, Congress’s Section 5 power cannot be broadly invoked as a substitute for the Article I powers—which will no longer support abrogation of sovereign immunity after *Seminole Tribe*—by purporting to protect constitutionally protected “property” interests wherever federal law provides for a pecuniary recovery.

⁶⁷ Id at 192.

⁶⁸ *CSB I*, 119 S Ct at 2228.

⁶⁹ Id (citing *Great Northern Life Ins. Co. v Read*, 322 US 47 (1944)).

⁷⁰ Id at 2229 (quoting *Edelman v Jordan*, 415 US 651, 673 (1974)).

⁷¹ Id.

⁷² Id at 2228.

Second, Section 5 “remedies” cannot be imposed in the absence of a widespread constitutional “problem” created by extant state constitutional violations. Where the constitutional violation is one of due process, moreover, the state must have failed to provide adequate remedies.⁷³

Third, states can no longer be subjected to federal court suit based on *Parden*’s “constructive waiver” theory.

The first two of these principles amount to significant Eleventh Amendment holdings in that they narrow the only source of federal abrogation authority left standing after *Seminole Tribe*. But that significance is derivative of their primary import, which is their *substantive* limitations on the scope of Congress’s Section 5 power. And the Court’s unwillingness to read that power broadly had been foreshadowed in *City of Boerne v Flores* two terms back.⁷⁴

The overruling of *Parden*, however, is arguably a significant Eleventh Amendment holding—but only arguably, as *Parden*’s constructive waiver approach had been doubted in theory and unused in practice for a number of years.⁷⁵ The recent proliferation of statutes like the TRCA and the Patent Remedy Act demonstrates that direct abrogation—not constructive waiver—had already become Congress’s tool of choice in avoiding the Eleventh Amendment bar. *CSB I* and *CSB II* will make that tool incrementally more difficult to use; *Alden*, on the other hand, extended the abrogation debate to entirely new territory.

C. ALDEN AND THE STATES’ IMMUNITY IN THEIR OWN COURTS

The underlying suit in *Alden* involved claims by state employees alleging violations of the Fair Labor Standards Act (FLSA), which was made applicable to state governments by amendments in 1974.⁷⁶ The employees, who sought compensation and liquidated

⁷³ As noted above, however, the “pattern of violations” aspect of this principle may not have been necessary to the decision in *CSB II*. See note 64.

⁷⁴ See *City of Boerne v Flores*, 521 US 507 (1997) (striking down the Religious Freedom Restoration Act).

⁷⁵ See *CSB I*, 119 S Ct at 226–28.

⁷⁶ 88 Stat 55, codified at 29 USC § 203. These amendments have been central to the history of federalism doctrine in the last quarter century: They were initially struck down in *National League of Cities v Usery*, in which case the Court recognized limits on Congress’s ability to regulate state governments “in areas of traditional governmental functions.” 426 US 833, 852 (1976). Then, in *Garcia v San Antonio Metropolitan Transit Authority*, the Court reversed *National League of Cities* and held that federalism-based limits on national power would henceforth be enforced primarily through the political process. 469 US 528, 556

damages under the Act, brought their suit initially in federal court, but that suit was dismissed in the wake of *Seminole Tribe*.⁷⁷ The employees then turned to state court, only to have their suit dismissed once again on the basis of sovereign immunity.⁷⁸ The Supreme Judicial Court of Maine affirmed the dismissal, holding that the provision of the FLSA purporting to subject the states to suit in their own courts was unconstitutional.⁷⁹

In his opinion for the majority affirming this holding, Justice Kennedy squarely confronted the Eleventh Amendment's inconvenient text:

[T]he fact that the Eleventh Amendment by its terms limits only "[t]he Judicial power of the United States" does not resolve the question. To rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisolm v Georgia*.⁸⁰

The majority thus made clear that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."⁸¹ According to the Court, "it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design."⁸²

Having dismissed the Eleventh Amendment itself, the majority relied heavily on historical evidence suggesting the acceptance of sovereign immunity as part of the legal background against which the Constitution was adopted.⁸³ Equally important support came from "the essential principles of federalism and . . . the special role of the state courts in the constitutional design."⁸⁴ Justice Ken-

(1985). I discuss the *Garcia* model of "process federalism" in the text accompanying notes 99–121.

⁷⁷ See *Mills v Maine*, 118 F3d 37 (1st Cir 1997) (affirming the district court's dismissal of the suit).

⁷⁸ See *Alden v Maine*, 715 A2d 172 (Me 1998). See also Katz, 1998 Wis L Rev at 1530 n 318 (cited in note 17) (collecting similar cases barring FLSA suits against the states in federal court).

⁷⁹ See 29 USC § 216(b) (Supp 1998) (subjecting the states to suit); *Alden*, 715 A2d at 173–74 (holding § 216(b) unconstitutional).

⁸⁰ *Alden v Maine*, 119 S Ct 2240, 2254 (1999).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Alden*, 119 S Ct at 2250–53.

⁸⁴ *Id.* at 2263.

nedy began with “the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.”⁸⁵ While this indignity is bad enough when the suit is in a federal court, it is even worse in the state’s own courts: To “press a State’s own courts into federal service,” Justice Kennedy argued, is “to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals.”⁸⁶ And practically speaking, such commandeering would permit judicial tribunals and private litigants to disrupt the basic resource allocation decisions of state governments.⁸⁷ Finally, the Court rejected the suggestion that Congress might have broader control over state sovereign immunity in the state’s own courts than Congress has in the federal courts.⁸⁸

The Court was at pains to note that recognition of state sovereign immunity would not “confer upon the State a concomitant right to disregard the Constitution or valid federal law.”⁸⁹ Congress retains the power to abrogate state immunity when it acts pursuant to the Section 5 power, as well as means (such as conditional grants of federal funding⁹⁰) to induce state consent to suit in other sorts of cases.⁹¹ States remain subject to suits by the federal government or by other states, and both their individual officers and their political subdivisions may be sued by individuals.⁹² In light of these principles, the Court concluded, “a federal power to subject nonconsenting States to private suits in their own courts is unnecessary to uphold the Constitution and valid federal statutes as the supreme law.”⁹³

The Court’s efforts to downplay the significance of its holding

⁸⁵ Id at 2264. See also id (“Not only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public’s behalf.”).

⁸⁶ Id.

⁸⁷ Id. In so doing, the Court said, abrogation of state immunity would blur lines of political accountability for those allocation decisions. Id at 2265.

⁸⁸ Id (rejecting any suggestion that “Congress may in some cases act only through instrumentalities of the States”).

⁸⁹ Id at 2266.

⁹⁰ See *South Dakota v Dole*, 483 US 203 (1987).

⁹¹ *Alden*, 119 S Ct at 2267.

⁹² Id.

⁹³ Id at 2268.

notwithstanding, *Alden* is an important extension of the immunity doctrines announced in *Seminole Tribe*. On one view of the matter, *Alden* is simply the logical implication of *Seminole Tribe*'s constitutionalization of the nontextual state sovereign immunity recognized in earlier cases. But it would also have been easy for the Court to draw a line between *Seminole Tribe* and *Alden*. The Eleventh Amendment has frequently been viewed as a forum selection provision—requiring states to be sued on their “home turf” rather than in federal court—rather than as a broad grant of substantive immunity in any forum.⁹⁴ And virtually all of the historical evidence cited by the Court in both *Seminole Tribe* and *Alden* concerned debates over the interaction of state sovereign immunity and the federal judicial power.⁹⁵

Even if the Eleventh Amendment had been intended to signify a broader constitutional immunity than its text suggested, then, there is no reason to assume that this constitutional immunity limited anything other than the judicial power of the United States. State sovereign immunity in state courts would thus remain a creature of state common law, untouched by the Constitution, and therefore freely preemptible by Congress. And practical considerations would have supported a view that state court suits are simply less intrusive on state interests than suits in federal court. It is one thing, after all, to be hauled into the potentially unfriendly courts of another sovereign; quite another to be required to defend in the friendly confines of a state's own courts.

Alden's expansion of the states' constitutional immunity to state court suits is thus an important new addition to the Court's federalism jurisprudence. Whether this development is in the long-term interests of the states is a difficult question that forms the primary subject of this article. Before turning to that question, I seek to develop an analytical framework for distinguishing and evaluating various approaches to federalism doctrine.

⁹⁴ See, e.g., *Hart & Wechsler* at 1076 (cited in note 30) (suggesting that the Amendment may be viewed “as being, in effect, a forum choice provision, which merely permits the states to resist *federal court* jurisdiction over suits . . . seeking retrospective relief—while leaving the state courts obliged, under the Supremacy Clause, to provide such relief in suits under federal law”).

⁹⁵ See Katz, 1998 Wis L Rev at 1479 (cited in note 17) (concluding that “even assuming counterfactually that the Framers of the Eleventh Amendment intend to enact the amalgam of rules the Court has held the Amendment to mandate, the historical record does not resolve whether they also meant to provide, or otherwise understood the states to enjoy, a constitutional immunity from claims arising under federal law brought in state court”).

II. THREE MODELS OF FEDERALISM

The doctrine of state sovereign immunity applied in *College Savings Board* and *Alden* derives not from constitutional text, but rather as an inference from constitutional structure. Not that there's anything wrong with that: As Charles Fried has observed, "[s]tructural arguments certainly have their place." But Professor Fried immediately goes on to recognize that such arguments "are slippery and easily overextended. One discipline on them is to ask that they make sense."⁹⁶ My primary task in this article is to ask whether the Court's structural arguments in *College Savings Bank* and *Alden* "make sense" as a strategy for protecting federalism, especially when viewed in the broader context of federalism doctrine as a whole.⁹⁷ In approaching this question, it may help more clearly to define three alternative models, or strategies, for protecting federalism that the Court has pursued over the last quarter century. All three have their merits, but they are not created equal. And to the extent that the Court's decision to pursue one strategy may trade off with its ability to pursue others, as I suggest below,⁹⁸ it is important to choose the right priorities.

A. PROCESS FEDERALISM

In *Garcia v San Antonio Metropolitan Transit Authority*,⁹⁹ the Court rejected a prior rule providing for substantive judicial protection of state autonomy in areas of "traditional government functions."¹⁰⁰ "[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause," the Court said, "is one of process rather than one of result."¹⁰¹ According to the Court, the states' direct representation in Congress and their critical role in electing the national executive is sufficient "to insulate the interests of the States."¹⁰² The Court thus endorsed Herbert

⁹⁶ Fried, New York Times at A17 (cited in note 10).

⁹⁷ I consider *Alden*'s somewhat unusual approach to structural argument as a theory of constitutional interpretation in Ernest A. Young, *Alden v Maine and the Jurisprudence of Structure*, 41 Wm & Mary L Rev (forthcoming May 2000).

⁹⁸ See text accompanying notes 261–66.

⁹⁹ 469 US 528 (1985).

¹⁰⁰ *National League of Cities v Usery*, 426 US 833, 852 (1976).

¹⁰¹ *Garcia*, 469 US at 554.

¹⁰² *Id* at 550–51.

Wechsler's influential assertion that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress."¹⁰³ Wechsler's thesis in turn echoed James Madison's argument, in *The Federalist* 45, that "each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them."¹⁰⁴

The *Garcia*/Wechsler thesis has been challenged, most tellingly by those who point out that the Seventeenth Amendment's provision for direct election of senators drastically altered Madison's assumption that state governments would be directly represented in the federal political process.¹⁰⁵ Other commentators have come forward to suggest that other "political safeguards" have developed in the later twentieth century to take the place of those that have been superseded,¹⁰⁶ while still others have argued that a focus on the bipolar balance between federal and state governments ignores the extent to which coalitions of states may use the federal government to impose their preferences on less powerful states.¹⁰⁷ But

¹⁰³ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum L Rev 543, 559 (1954). See also Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 171–259 (Chicago, 1980); Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 Wash U L Q 779 (1982).

¹⁰⁴ Federalist 45 (Madison) in Clinton Rossiter, ed, *The Federalist Papers* 291 (Mentor, 1961). But see text accompanying notes 199–210 (explaining that Madison's argument ultimately rested on the authority of the states to regulate those subjects most immediate to the people's everyday lives).

¹⁰⁵ See, e.g., *Garcia*, 469 US at 565–66 n 9 (Powell dissenting); William W. Van Alstyne, *The Second Death of Federalism*, 83 Mich L Rev 1709, 1722–27 (1985); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 Supreme Court Review 341, 392–93; Lewis Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum L Rev 847, 849 (1979). See also Larry Kramer, *Understanding Federalism*, 47 Vand L Rev 1485, 1503–14 (1994) (criticizing the political safeguards thesis as originally formulated).

¹⁰⁶ See, e.g., Kramer, 47 Vand L Rev at 1522–46 (cited in note 105) (discussing the roles of political parties and administrative agencies in protecting state prerogatives); Jenna Bednar and William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S Cal L Rev 1447, 1485 (1995) (making similar arguments).

¹⁰⁷ See Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 Colum L Rev 1911, 1940 (1995) ("The problem . . . lies in the ability of *some states* to harness the federal

leaving this debate aside, both proponents and opponents of the *Garcia*/Wechsler thesis may have underestimated the potential of process federalism to move the law at least some distance away from the regime of no protection for state prerogatives that prevailed immediately after the New Deal.¹⁰⁸

The Court might choose to enforce process federalism in a number of different ways, with varying degrees of doctrinal “bite.” One method of choice has been the use of presumptions in interpreting federal statutes. The Court has long employed a presumption against preemption in construing the impact of federal legislation on state regulatory authority.¹⁰⁹ And the Court has employed stronger presumptions—“clear statement rules”—where federal statutes arguably regulate core state governmental functions,¹¹⁰ impose conditions on federal funding,¹¹¹ or subject the states to suit in federal court pursuant to Congress’s remaining Section 5 abrogation power.¹¹² The purpose of such rules is to make sure that the “political safeguards of federalism” are fully operational; as the Court explained in *Gregory v Ashcroft*,

lawmaking power to oppress *other states*. Not only can the state-based allocation of congressional representation not protect states against this use of the federal lawmaking power, it facilitates it.”). Other critics have pointed out that the Court has not generally been willing to abandon substantive judicial review of separation of powers issues, despite the fact that political checks are at least as strong in that context as in the federalism area. See, e.g., *Garcia*, 469 US at 567 n 12 (Powell dissenting); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum L Rev 1, 18–19 & n 108 (1988).

¹⁰⁸ See, e.g., *Wickard v Filburn*, 317 US 111 (1942) (construing federal power *very* broadly); *United States v Darby*, 312 US 100 (1941) (same). Some commentators did immediately recognize process federalism’s potential. See Rapaczynski, 1985 Supreme Court Review at 364–66 (cited in note 105).

¹⁰⁹ See, e.g., *Cipollone v Liggett Group, Inc.*, 505 US 504, 516 (1992); *Rice v Santa Fe Elevator Corp.*, 331 US 218, 230 (1947) (“[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”). An even more venerable form may be the familiar canon holding that statutes in derogation of the common law are disfavored. As David Shapiro has demonstrated, this canon frequently operates to protect state autonomy because so much of the common law background is state law. See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 NYU L Rev 921, 937 (1992).

¹¹⁰ *Gregory v Ashcroft*, 501 US 452, 460–64 (1991).

¹¹¹ *Pennhurst State School & Hosp. v Halderman*, 451 US 1, 17 (1981).

¹¹² *Atascadero State Hosp. v Scanlon*, 473 US 234, 243 (1985). See also *Will v Michigan Dept. of State Police*, 491 US 58, 65 (1989) (applying clear statement rule to decide whether Congress subjected state officials in their official capacities to liability under 42 USC § 1983). For a general discussion of the Court’s clear statement jurisprudence, see William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand L Rev 593 (1992). See also Rapaczynski, 1985 Supreme Court Review at 418 (cited in note 105) (anticipating this implication of process federalism).

[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."¹¹³

By demanding that the intent to impinge on state interests be clear and obvious, in other words, the Court ensures that the states' representatives in Congress have focused on the federalism issue in the course of enacting the legislation in question.

A potentially more aggressive way of enforcing this political check is to demand that federal legislation adversely affecting state authority be supported by express congressional findings on the federalism issue.¹¹⁴ In *United States v Lopez*, for instance, one of the factors cited by the Court in striking down the federal Gun Free School Zones Act was the absence of any legislative findings concerning the impact of guns in schools on interstate commerce.¹¹⁵ While the extent to which the lack of congressional findings was dispositive in *Lopez* is unclear,¹¹⁶ some academics have endorsed this aspect of the Court's approach as a potential means of avoiding the need to draw lines limiting the substantive extent of Congress's authority.¹¹⁷ Depending on whether or not boilerplate

¹¹³ *Gregory*, 501 US at 464 (quoting Laurence H. Tribe, *American Constitutional Law* § 6-25, at 480 (Foundation Press, 2d ed 1988) ("Second Edition")).

¹¹⁴ See generally Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v Lopez*, 46 Case W Res L Rev 695 (1996); Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v Lopez*, 46 Case W Res L Rev 757 (1996).

¹¹⁵ 514 US 549, 561-63 (1995). See also Jackson, 111 Harv L Rev at 2239 & nn 254-55 (cited in note 16) (discussing the state of the legislative record supporting the Act).

¹¹⁶ Both the majority and the dissents denied that it was. See 514 US at 562 (majority opinion); id at 613 (Souter dissenting); id at 617-18 (Breyer dissenting). The Fourth Circuit's decision striking down the federal Violence Against Women Act (VAWA), 42 USC § 13981, in *Brzonkala v Virginia Polytechnic Institute*, 169 F3d 820 (4th Cir 1999) (en banc), cert granted, 1999 US LEXIS 4745, offers the Court an opportunity to clarify the relative importance of legislative findings. While the VAWA suffers from several of the same weaknesses as the Gun Free School Zones Act—that is, it does not regulate commercial activity, and the chain of causation linking it to interstate commerce is very long—the VAWA is supported by extensive testimonial evidence and legislative findings concerning the impact of violence against women upon the national economy. See id at 913-14 (Motz dissenting) (cataloging these findings).

¹¹⁷ See, e.g., Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 Tex L Rev 795, 823-26 (1996); Jackson, 111 Harv L Rev at 2237 (cited in note 16) (arguing that the Court should consider "both the record before Congress and any formal legislative findings in

findings are held sufficient to sustain federal legislation,¹¹⁸ this approach has the potential to be even more protective of state authority than the Court's clear statement rules.

A final, and frequently overlooked, form of process federalism is the framework of rules governing which actors in the national government are empowered to make federal law. By abandoning the idea of a general federal common law, for instance, *Erie Railroad v. Tompkins* helped to ensure that lawmaking decisions that preempt state law (formally or in effect) would be made by Congress, in which the states are represented, and not by federal judges.¹¹⁹ And by requiring that federal law be made through the cumbersome process provided by Article I, doctrines like *Erie* ensure that this gauntlet performs its intended function of cutting back on the volume of potentially preemptive federal law.¹²⁰ Conversely, the abandonment of the nondelegation doctrine and consequent dramatic expansion of federal lawmaking by executive agencies (who need not run the Article I gauntlet and are not directly representative of the states) represent a substantial erosion of process federalism values.¹²¹

order to determine whether the case had been made that the measure was 'necessary and proper' to carrying out enumerated powers").

¹¹⁸ See, e.g., 104 PL 208, 110 Stat 3009, § 651 (1996) (amending the Gun Free School Zones Act to include congressional findings of an impact on interstate commerce). See also Matthew D. Adler and Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 Supreme Court Review 71, 136 (arguing that the efficacy of a formal finding requirement may be short-lived if congressional staff learn to include boilerplate findings as a matter of course).

¹¹⁹ See *Erie Railroad v. Tompkins*, 304 US 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law."). Pre-*Erie* federal determinations of "general" common law did not, of course, preempt state law outside federal diversity suits, but the forum-shopping option provided by the pre-*Erie* regime did give many parties an ability to evade state law by filing in federal court.

¹²⁰ See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after Erie*, 145 U Pa L Rev 1459, 1478-93 (1997). *Murdock v. Memphis*, 87 US (20 Wall) 590, 633 (1874), plays a similar role by providing that, although Congress may preempt state law when it follows the difficult Article I procedure, Congress "may not have the power to authorize the Supreme Court to supplant state courts as the authoritative declarer of law within their jurisdictions by functioning as a court of last resort with respect to questions of state common law and state statutory law." Tribe, *Second Edition*, § 5-20, at 380 (cited in note 113).

¹²¹ See, e.g., Merritt, 88 Colum L Rev at 10 (cited in note 107) (linking the Court's abandonment of nondelegation to a general expansion of federal regulatory authority at the expense of the States); Damien J. Marshall, Note, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 Geo L J 263 (1998) (highlighting the tension between federalism values and judicial deference to federal administrative agencies).

B. POWER FEDERALISM

Despite the potential of process federalism to offer significant protection for state authority, its requirements for expanding federal authority can always be surmounted by a sufficiently determined Congress. And no matter how many procedural hoops a fox must jump through to gain entry to the henhouse, it is still a fox.¹²² In a political environment in which a state's federal representatives may often compete with state government officials for opportunities to gain the attention of their shared constituents, it is questionable how often members of Congress will place a high priority on protecting the prerogatives of state government.¹²³ For these reasons, among others, the Court has recently turned from the exclusive reliance on process federalism suggested by *Garcia*, to an attempt to delineate substantive limits on Congress's authority.

These lines, however, are notoriously hard to draw, and the Court has been burned before in attempting to draw them.¹²⁴ At least three distinct approaches show up in the recent cases and academic literature. The first is to identify certain enclaves of exclusive state authority that are immune from federal regulation.

¹²² See, e.g., Bednar and Eskridge, 68 S Cal L Rev at 1473–74 (cited in note 106) (describing Congress's incentives to “cheat” on the federal arrangement by aggrandizing its own power at the expense of the states); Rapaczynski, 1985 Supreme Court Review at 388 (cited in note 105) (arguing that the federal government is likely to be influenced by well-established interest groups which have incentives to suppress the more diverse interests likely to be prevalent in the states). See also Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 Nw U L Rev 819, 866 (1999) (“[E]ven if the States were expert lobbyists, one may seriously question whether effective lobbying is really sovereignty.”).

¹²³ See, e.g., Jackson, 111 Harv L Rev at 2226 n 206 (cited in note 16) (noting that “senators, like their colleagues in the House, are said to represent, not the interests of states as governments, but the interests of people in the states”); Merritt, 88 Colum L Rev at 15–16 (cited in note 107) (same); Kramer, 47 Vand L Rev at 1510–11 (cited in note 105) (“Federal politicians will want to earn the support and affection of local constituents by providing desired services themselves—through the federal government—rather than to give or share credit with state officials. State officials are rivals, not allies, a fact the Framers understood and the reason they made Senators directly beholden to state legislators in the first place.”).

¹²⁴ See, e.g., *United States v Lopez*, 514 US 549, 604 (1995) (Souter dissenting) (“The modern respect for the competence and primacy of Congress in matters affecting commerce developed only after one of this Court's most chastening experiences, when it perforce repudiated an earlier and untenably expansive conception of judicial review in derogation of congressional commerce power.”). See also Rapaczynski, 1985 Supreme Court Review at 351 (cited in note 105) (asserting that “even a moderately searching scrutiny of the powers of the federal government shows that the alleged existence of a residual category of exclusive state powers over any private, nongovernmental activity is in fact illusory”).

Both the majority and dissenting justices in *Lopez*, for example, seemed to agree that the federal government generally has no power to regulate family law.¹²⁵ But such enclaves are exceptionally difficult to sustain because they frequently overlap with areas in which federal authority is unquestioned. Few would doubt, for instance, federal authority to provide remedies for delinquent child support payments where the offending parent lives in another state.¹²⁶ And it is woefully easy to reconstruct Justice Breyer's factually indisputable argument in *Lopez* that guns in schools have an impact on the national economy as an argument that family law has a similar effect: Surely family conditions have a greater impact on a child's education than the occasional presence of a gun, and the causal chain from education to jobs to productivity to the GNP flows smoothly from there.¹²⁷

The recent execution of Angel Breard in Virginia provides another example.¹²⁸ If enclaves of exclusive state authority exist, then surely prescription of punishments for violations of state criminal law is one of them. Just as surely, the federal government has primary authority over foreign relations. So who should have the final say when a state's execution of a foreign national for a state law crime threatens to throw a wrench into American foreign policy? While the proper resolution of such cases is far from obvious, the one clear point is that both federal and state interests ought to count for something.¹²⁹ Our world, then, is one of largely *concurrent* power—one in which virtually any subject, depending on the circumstances, may (or may not) fall within the realm of legitimate federal authority.

The remaining two sorts of "power" federalism take account of this reality. One would simply increase the rigor with which the

¹²⁵ See *Lopez*, 514 US at 564 (majority opinion); id at 624 (Breyer dissenting).

¹²⁶ See Child Support Recovery Act of 1992, 18 USC § 228. Similarly, some have argued that the federal government may extensively regulate family law pursuant to the Treaty Power by ratifying and implementing the International Convention on the Rights of the Child. See, e.g., Susan Kilbourne, *The Convention on the Rights of the Child*, 5 Geo J Fighting Poverty 327 (1998).

¹²⁷ Compare *Lopez*, 514 US at 619–23 (Breyer dissenting).

¹²⁸ See *Breard v Greene*, 118 S Ct 1352 (1998) (per curiam).

¹²⁹ This recognition cuts both ways, to suggest that traditionally federal enclaves ought to be less exclusive than many have thought. See, e.g., Ernest A. Young, *Preemption at Sea*, 67 Geo Wash L Rev 273, 329–33 (1999) (demonstrating that the traditionally federal enclave of maritime law overlaps with areas of traditional state authority).

Court will examine the connection between a given federal action and an enumerated source of constitutional authority. So, for instance, the Court in *South Dakota v Dole* assumed that some nexus must exist between conditions placed on federal funding and the purposes of the spending program to which they are attached.¹³⁰ Similarly, in *Lopez*, the Court rejected the attenuated (if factually persuasive) chain of causation advanced by Justice Breyer linking guns in schools to interstate commerce¹³¹ and instead seemed to suggest that Congress must regulate commercial transactions directly when acting under the Commerce Clause.¹³²

The Court has imposed similar limits when Congress acts pursuant to Section 5 of the Fourteenth Amendment. *City of Boerne v Flores* insisted that Congress's power is strictly remedial—that is, Congress may act only to prevent or remedy an actual constitutional violation, and the federal cure must be proportionate to the state violation.¹³³ The *College Savings Bank* opinions tighten this analysis by narrowing the scope of “property” interests that may serve as a predicate for federal protection, and by insisting that the violations addressed by the federal law be widespread and unremedied by state governments.¹³⁴ This line of cases effectively restricts the circumstances in which Congress can use the possibility of state constitutional violations as a basis for preempting state efforts to regulate private conduct.¹³⁵

¹³⁰ 483 US 203, 207–08 (1987). Because conditional spending offers a convenient “end run” around other restrictions on Congress's power, limits on the Spending Power may be the most critical aspect of power federalism. Baker, 95 Colum L Rev at 1914 (cited in note 107). At present, the doctrine as applied in *Dole* provides little meaningful constraint. For a proposal for tightening up the *Dole* test, see *id* at 1962–78. See also text accompanying notes 267–79.

¹³¹ 514 US at 619–23 (Breyer dissenting).

¹³² *Id* at 561 (majority opinion). A more limited reading would be that Congress's burden of justification is higher when it does not act upon commerce directly. Either version invites unfortunate comparisons to the old direct/indirect effects test employed by the Court during the *Lochner* period. See, e.g., *A.L.A. Schechter Poultry Corp. v United States*, 295 US 495, 545–48 (1935).

¹³³ *City of Boerne v Flores*, 521 US 507, 519 (1997). *City of Boerne* struck down the Religious Freedom Restoration Act, 42 USC § 2000bb et seq, which essentially mandated religious exemptions from generally applicable laws. Because subjecting religious practices to generally applicable laws was not unconstitutional in light of the Court's prior decision in *Employment Division v Smith*, 494 US 872 (1990), there was no adequate connection between the Religious Freedom Restoration Act and the enumerated basis of Congress's power. 521 US at 532.

¹³⁴ See text accompanying notes 63–65.

¹³⁵ See text accompanying notes 220–30.

A third approach asks whether, assuming that regulatory powers are *potentially* concurrent, the federal legislation responds to any actual need for national action on the particular problem at issue.¹³⁶ Donald Regan, for example, has suggested that this is the best way to read *Lopez*.¹³⁷ The Gun Free School Zones Act was unconstitutional, he argues, because it did not respond to any collective action problem or other circumstance that made it difficult to regulate guns in school at the state level.¹³⁸ The Chief Justice's opinion in *CSB II* arguably confirms this principle, as it imposes under the Section 5 power a requirement that Congress show an extant pattern of constitutional violations as a predicate to federal action—in other words, a “problem” requiring solution at the federal level.¹³⁹

What all these approaches share is the mandate that the federal government simply cannot act on some subjects, at certain times or in certain circumstances, no matter what process it follows or how clearly it expresses its wish to do so. Because the remedy is so drastic, however, the Court has been most reluctant to impose these sorts of limits (at least in the post–New Deal era). The result is a set of doctrines that are far more embryonic at this point than those in the other two categories.

C. IMMUNITY FEDERALISM

While the Court has been hesitant to impose substantive limits on federal power, it has shown no such reluctance in a third category that I have called “immunity federalism.” These cases involve protecting the states from being held accountable, in their own activities, to federal norms. The most obvious example, of course, is the Court's state sovereign immunity jurisprudence; others include doctrines barring federal interference with such basic

¹³⁶ See, e.g., Kramer, 47 Vand L Rev at 1499 (cited in note 105) (suggesting that courts could plausibly require Congress to demonstrate a need for federal action in order to eliminate externalities or protect local minorities, or to show that the states have already been given adequate time to experiment prior to the federal initiative); Bednar and Eskridge, 68 S Cal L Rev at 1469–70 (cited in note 106) (identifying collective action problems justifying federal intervention).

¹³⁷ See Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v Lopez*, 94 Mich L Rev 554, 555 (1995).

¹³⁸ Id at 569.

¹³⁹ *CSB II*, 119 S Ct at 2207–08.

governmental decisions as the location of the state capitol.¹⁴⁰ The immunity federalism model differs from “power” federalism in that it has nothing to do with the broad question of what level of government will regulate private conduct; rather, these cases are concerned with the federal government’s ability to regulate the activities and conduct of state governments themselves. In many immunity federalism contexts, moreover, the rules announced by the Court do not even render federal norms nonbinding on state governments. Instead, they simply affect the ability of federal courts or private actors to enforce those norms directly against the states.

The state sovereign immunity cases are not the only example of immunity federalism. The category also includes the Court’s extensive jurisprudence limiting federal court interference, through the writ of habeas corpus, with state court criminal prosecutions. The Burger and Rehnquist Courts have actively sought to limit the federal courts’ ability to reopen state convictions through such means as limiting the application on habeas of “new” federal rules¹⁴¹ and expanding the scope of procedural default and abuse of the writ.¹⁴² These decisions do not modify the preemptive effect of federal constitutional and statutory rules on state regulation of private criminal conduct; federal constitutional rules on the permissible criteria for capital crimes,¹⁴³ for example, still supersede contrary state rules. Instead, more restrictive habeas rules serve in many cases to make the state courts the last word on federal claims,¹⁴⁴ “immune” from later revision in a federal habeas corpus proceeding.

My central argument is that, in the broad picture, expanding the immunity model of federalism is a poor way to protect the

¹⁴⁰ See *Coyle v Smith*, 221 US 559, 565 (1911). See also *Helvering v Gerhardt*, 304 US 405, 419–21 (1938) (recognizing some sphere of state governmental immunity from federal taxation).

¹⁴¹ See *Teague v Lane*, 489 US 288 (1989).

¹⁴² See *Wainwright v Sykes*, 433 US 72 (1977) (procedural default); *McCleskey v Zant*, 499 US 467 (1991) (abuse of the writ).

¹⁴³ See, e.g., *Lockett v Ohio* 438, US 586, 605 (1978) (plurality opinion) (requiring states to permit sentencing authority to consider mitigating factors in capital cases).

¹⁴⁴ See, e.g., *Wainwright*, 433 US at 90 (arguing that strict procedural default rules “will have the salutary effect of making the state trial on the merits the ‘main event,’ so to speak, rather than a ‘tryout on the road’ for what will later be the determinative federal habeas hearing”).

states' role in our federal system.¹⁴⁵ I will try to make that case in Part V below. It will illuminate that discussion, however, to first explain how two of the Court's most recent efforts to develop judicially enforceable limits on federal authority—the “traditional governmental functions” jurisprudence of *National League of Cities v Usery*, and the anticommandeering principle of *New York and Printz*—fit into the tripartite scheme that I have laid out above.

D. HARD CASES

In *National League of Cities v Usery*,¹⁴⁶ the Court struck down the 1974 amendments to the Fair Labor Standards Act (FLSA)—the same amendments at issue in *Alden*—which had extended federal wage and hour regulations to cover most state and municipal employees.¹⁴⁷ Although the Court recognized that these amendments fell within the legitimate scope of the commerce power,¹⁴⁸ it held that general principles of state sovereignty forbade application of the FLSA to state governments. Subsequent opinions condensed the doctrine to a three-factor test: a federal law would be invalid if it (1) regulated the “States as States,” (2) concerned matters that are “indisputably ‘attribute[s] of state sovereignty,’” and (3) directly impaired states’ ability “to structure integral operations in areas of traditional governmental functions.”¹⁴⁹

Although *National League of Cities* announced an affirmative and substantive limit on Congress’s commerce power,¹⁵⁰ it operated as

¹⁴⁵ Federal habeas corpus doctrine may or may not be a special case, as it tends to involve a wide range of considerations—such as the accuracy and efficiency of criminal proceedings—not generally implicated in broader federalism debates. I therefore take no position here as to whether recent trends in habeas doctrine may be justified on grounds other than a general need to protect federalism by rendering the states less accountable to federal norms.

¹⁴⁶ 426 US 833 (1976).

¹⁴⁷ Prior to *National League of Cities*, “the conventional wisdom was that federalism in general—and the rights of states in particular—provided no judicially-enforceable limits on congressional power.” Tribe, *Second Edition* § 5-20, at 378 (cited in note 113).

¹⁴⁸ See *National League of Cities*, 426 US at 841.

¹⁴⁹ *Hodel v Virginia Surface Mining & Reclamation Assn., Inc.*, 452 US 264, 287–88 (1981) (internal citations omitted). The cases also recognized “situations in which the nature of the federal interest advanced may be such that it justifies state submission.” *Id.* at 288 n 29.

¹⁵⁰ See Tribe, *Second Edition* § 5-22, at 386 (cited in note 113) (observing that the case “for the first time in our history created an outright override—a veto on otherwise authorized congressional legislation”).

a protection for the states' right to structure their own internal governmental operations as they saw fit. Nothing in *National League of Cities* questioned Congress's authority to apply the FLSA to private employers, or to preempt state laws that regulated private wages and hours in a way inconsistent with federal directives. The *National League of Cities* doctrine thus fell within the category of immunity federalism. It allowed state governments to stand apart from a federal regulatory scheme, but did nothing to protect their own regulatory power over their citizens.¹⁵¹

The anticommandeering doctrine articulated in *New York v United States*¹⁵² and *Printz v United States*¹⁵³ presents a more complicated picture. Like *National League of Cities*, the anticommandeering rule is also phrased as a substantive limit on Congress's power: "Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it *lacks the power* directly to compel the States to require or prohibit those acts."¹⁵⁴ But as the quoted language makes clear, the anticommandeering rule—like the *National League of Cities* doctrine—does not go to the ultimate authority of Congress "to pass laws requiring or prohibiting certain acts." Congress remains free to regulate private conduct howsoever it chooses; it simply cannot employ state governmental entities as instruments of that regulation. In this sense, the anticommandeering rule follows the model of immunity federalism.¹⁵⁵

Both the *New York* and *Printz* opinions, however, pay substantial

¹⁵¹ See Rapaczynski, 1985 Supreme Court Review at 362 (cited in note 105) (observing that *National League of Cities* "did not protect the states as governmental institutions in the sense . . . of assuring their ability to impose the ultimate rules of conduct in any given area of extragovernmental activities"); Rappaport, 93 Nw U L Rev at 820 (cited in note 122) (characterizing *National League of Cities* as an immunity doctrine).

¹⁵² 505 US 144 (1992) (holding that Congress may not require state legislatures to regulate pursuant to a federal regulatory scheme).

¹⁵³ 521 US 898 (1997) (holding that Congress may not require state executive officials to participate in implementing a federal regulatory scheme).

¹⁵⁴ *New York*, 505 US at 166 (emphasis added).

¹⁵⁵ See Rappaport, 93 Nw U L Rev at 819 (cited in note 122) (characterizing *New York* and *Printz* as articulating an immunity doctrine). It is somewhat imprecise to say that "the new jurisprudence of commandeering purports to define an area of total state . . . immunity from federal intervention." Adler and Kreimer, 1998 Supreme Court Review at 72 (cited in note 118). *New York* and *Printz* forbid Congress to use a particular *means* of regulation (requiring state personnel to implement federal directives) but do not wall off any substantive area (like family law) from federal regulation.

attention to questions of process. Both are concerned that allowing Congress to require state governmental institutions to carry out federal directives may blur lines of political accountability; disappointed gun license applicants, for example, may blame the state sheriff who carries out the background check rather than the Congress that imposed the requirement.¹⁵⁶ Because process federalism is ultimately rooted in the ability of the people to favor the institutions of government that are most responsive to their needs,¹⁵⁷ ambiguity as to political responsibility for programs and mandates can undermine the system.

A second aspect of process federalism that is largely implicit in the *New York* and *Printz* opinions, but explicit in the process federalism literature, is the need to ensure that the federal government internalizes the costs of its regulatory programs.¹⁵⁸ As long as costs are internalized, they will act as a constraint on Congress's ability to legislate in ways that may supersede state authority. If Congress can "commandeer" state enforcement resources, or force state legislatures to devote their time and attention to fleshing out federal regulatory mandates, Congress may be able to avoid much of the cost of its regulatory activity.¹⁵⁹ As Justice Scalia observed in *Printz*, "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States."¹⁶⁰

The anticommandeering principle thus partakes of both immunity and process federalism. This fact demonstrates that my three types of federalism represent different approaches or strategies rather than mutually exclusive categories. Particular doctrinal tools may simultaneously pursue two or even all three approaches. Yet differentiating among these strategies may still clarify our thinking about the pros and cons of particular doctrines.

Distinguishing among these strategies accordingly highlights

¹⁵⁶ *Printz v United States*, 521 US at 930. See also Jackson, 111 Harv L Rev at 2200–05 (cited in note 16) (discussing the political accountability argument in *Printz*).

¹⁵⁷ See text accompanying notes 199–210.

¹⁵⁸ See La Pierre, 60 Wash U L Q at 988–89 (cited in note 103). The political accountability aspect of *New York* and *Printz* can be seen as a requirement that Congress internalize the political costs of the requirements that it imposes.

¹⁵⁹ See, e.g., La Pierre, 60 Wash U L Q at 1034 (cited in note 103); Bednar and Eskridge, 68 S Cal L Rev at 1473–74 (cited in note 106).

¹⁶⁰ 521 US at 922.

what the anticommandeering principle does *not* do: directly protect the regulatory authority of the states from federal encroachments. Indeed, one frequently remarked drawback of the anticommandeering rule is that it invites the federal government simply to supplant state authority altogether in a given field, expanding its own administrative rulemaking and enforcement apparatus as necessary to complete the job without state assistance.¹⁶¹ I argue below that this threat—that federal activity may leave state governments with little or nothing to do—should be the focus of modern federalism doctrine.¹⁶² The extent to which the Court's federalism decisions of last Term reflect this priority is the subject of the next three sections.

III. PROCESS FEDERALISM, LOW HANGING FRUIT, AND THE BIGGEST FEDERALISM DECISION OF LAST TERM

One can never be sure about such things, but it seems unlikely that the Chief Justice has ever sat down in private conference with Justices O'Connor, Scalia, Kennedy, and Thomas to discuss what an ideal framework of federalism doctrines would look like or what the best strategy of case selection and decision would be to get there. Federalism doctrine is an incompletely theorized, common law sort of creature, and for this reason it is unrealistic to expect that doctrine to be perfectly coherent or strategic. In this section I discuss, first, why federalism doctrine tends to focus on targets of opportunity rather than a "master plan," and, second, why the process federalism of *Garcia* continues to present important opportunities despite its obvious limitations as a comprehensive vehicle for protecting state authority. In connection with the latter point, I risk a slight detour from state sovereign immunity to discuss last Term's decision in *AT&T Corp. v Iowa Utilities Board*,¹⁶³ a case whose significance for state authority surely dwarfs

¹⁶¹ Id at 959 (Stevens dissenting); *New York*, 505 US at 210 (White dissenting). While requiring the federal government to foot the entire bill for such efforts will act as some constraint, the federal government's ultimate control over the national revenue base ensures that such constraints can be overcome if the requisite political will exists. Compare Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 Harv J L & Pub Pol 95, 104 (1998) (tracing much of the dramatic expansion in federal power to the Sixteenth Amendment's provision for a federal income tax).

¹⁶² See text accompanying notes 199–210.

¹⁶³ 119 S Ct 721 (1999).

that of *Alden* and *College Savings Bank*. *Iowa Utilities Board* illustrates, in my view, the extent to which the Court's focus on immunity federalism may have caused it to overlook process federalism's significant potential.

A. THE COMMON LAW DEVELOPMENT OF FEDERALISM DOCTRINE

Justice O'Connor has frankly acknowledged that the Court's federalism decisions have followed an "unsteady path."¹⁶⁴ The commentators have been even less charitable.¹⁶⁵ Much of the doctrine's unsteadiness, however, is fairly traceable to more or less unavoidable characteristics of federalism as an issue and/or the Court as an institution. As a preface to evaluating whether the Court's sovereign immunity decisions make doctrinal and strategic sense as a means of protecting federalism, then, it is important to understand some of the inevitable limitations of the Court's enterprise.

Although the Court's five-member "conservative" majority has maintained a relatively united front on federalism issues—particularly in comparison to issues like substantive due process or equal protection¹⁶⁶—this consensus nevertheless overlies a number of important cross-cutting differences on issues of both substance and method. The Court's approach to problems of conditional spending and conditional preemption, for example, has been dramatically shaped by the fact that while Justice O'Connor believes in the unconstitutional conditions doctrine,¹⁶⁷ the Chief Justice has adamantly opposed it across a wide range of doctrinal categories.¹⁶⁸

¹⁶⁴ *New York v United States*, 505 US 144, 160 (1992).

¹⁶⁵ See, e.g., Bednar and Eskridge, 68 S Cal L Rev at 1447 (cited in note 106) (asserting that the Court's decisions have "waffled famously" and "flunk requirements of either good law or good policy"); Adler and Kreimer, 1998 Supreme Court Review at 72 (cited in note 118) (arguing that "[t]he area lacks a fabric of constitutional law sufficiently coherent and well-justified to last").

¹⁶⁶ See, e.g., *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992) (O'Connor and Kennedy joining more liberal Justices to uphold expansive application of substantive due process); *Romer v Evans*, 517 US 620 (1996) (same with equal protection).

¹⁶⁷ See, e.g., *South Dakota v Dole*, 483 US 203, 213–15 (1987) (O'Connor dissenting).

¹⁶⁸ See, e.g., *id* at 210 (majority opinion); *Regan v Taxation with Representation*, 461 US 540, 549 (1983) (arguing that government "largesse" is "a matter of grace," even when conditioned on an agreement not to exercise constitutional rights). See also Baker, 95 Colum L Rev at 1915 n 13 (cited in note 107) (discussing the Chief Justice's attraction to the "greater power includes the lesser" argument).

Similarly, one hesitates to predict any revival of the *National League of Cities* analysis because, while Justices Kennedy and O'Connor may be willing to deal with the amorphousness of that analysis through case-by-case elaboration,¹⁶⁹ Justice Scalia's commitment to bright-line rules might prevent him from going along.¹⁷⁰ And while Justice Thomas has articulated what is essentially a compact theory of federalism,¹⁷¹ Justices O'Connor and Kennedy are both on record in support of dual sovereignty.¹⁷²

As Cass Sunstein has explained, building consensus among jurists whose substantive and methodological commitments differ in such ways frequently requires "incompletely theorized agreements" that do not aspire to complete coherence.¹⁷³ Because opinions must work to justify a result upon which the Justices agree while skirting the underlying fissures of potential disagreement, the writing Justice in each case has good reasons to avoid any attempt to articulate a comprehensive theory of federalism. The absence of such articulation, in turn, increases the likelihood that the next case, while not inconsistent in terms of its result, may rest on somewhat different theoretical premises. And the absence of any central textual provision in the Constitution—we have several clauses with important federalism implications, but no central "Federalism Clause"—increases the likelihood that the doctrine will evolve in this common law fashion.¹⁷⁴ Federalism doctrine,

¹⁶⁹ See, e.g., *Garcia v San Antonio Metropolitan Transit Auth.*, 469 US 528, 588–89 (1985) (O'Connor dissenting); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 Harv L Rev 22, 115–21 (1992) (describing the preference of Justices O'Connor and Kennedy for standards over rules).

¹⁷⁰ Compare, e.g., Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U Chi L Rev 1175 (1989), with *Garcia*, 469 US at 538–39 (decrying the amorphous nature of the *National League of Cities* inquiry).

¹⁷¹ See *U.S. Term Limits, Inc. v Thornton*, 514 US 779, 846 (1995) (Thomas dissenting) ("The ultimate source of the Constitution's authority is the consent of the people of each individual state, not the consent of the undifferentiated people of the nation as a whole.").

¹⁷² See *Gregory v Ashcroft*, 501 US 452, 457–60 (1991) (O'Connor, J); *Term Limits*, 514 US at 838–39 (Kennedy concurring).

¹⁷³ See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv L Rev 1733, 1746–47 (1995).

¹⁷⁴ Several scholars have tried to locate protection for state sovereignty in a particular clause of the Constitution. See, e.g., Merritt, 88 Colum L Rev 1 (cited in note 107) (Guarantee Clause); Rappaport, 93 Nw U L Rev 819 (cited in note 122) (relying on the meaning of "state" in various clauses). But in each case the central provision is so open-ended that it provides little unifying bite. See Young, *Jurisprudence of Structure*, 41 Wm & Mary L Rev (cited in note 97) (arguing that each textual theory merely imports larger theories about structure). Moreover, the very multiplicity of textual options, in conjunction with

perhaps even more than other doctrinal areas, has been characterized by a variety of adaptive and decentralized responses to changing institutional circumstances over time rather than any attempt to discover the essential meaning of a particular constitutional provision.¹⁷⁵

The institutional characteristics of the Court also undermine its ability to pursue a coherent strategy in advancing a particular federalism agenda. Social movements can often, to some extent at least, formulate a sequenced litigation strategy that presents legal questions in an order designed to bring about a coherent and favorable doctrine.¹⁷⁶ Despite the discretionary character of certiorari jurisdiction, however, the Court can select only among the cases presented to it, and lower courts are frequently in a position to force Supreme Court review whenever they decide against the constitutionality of a federal statute.¹⁷⁷ More importantly, the Court's actual or perceived political weakness has encouraged it to begin with the "low hanging fruit"—the doctrinal advances that can be achieved without entering into undue conflict with the political branches. It is probably no coincidence that the statutory provisions invalidated in *Lopez*, *Seminole Tribe*, and *Printz*, for example, were relatively insignificant ones.

In light of these realities, it seems unfair to criticize the Court's federalism doctrines for not being perfectly coherent or symmetrical. In an important recent article, for example, Matthew Adler

the theory of enumerated powers—which, by definition, relies primarily on the limits of the various provisions of Article I—makes it difficult to base any grand unified theory of federalism in the text.

¹⁷⁵ On the common law approach, see generally David Strauss, *Common Law Constitutional Interpretation*, 63 U Chi L Rev 877 (1996); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 NC L Rev 619, 688–97 (1994).

¹⁷⁶ See, e.g., Jack Greenberg, *Crusaders in the Courts* (Basic Books, 1994) (chronicling the NAACP Legal Defense Fund's legal strategy). The proliferation of interest groups using litigation as an important part of their strategy may have made such coordination more difficult of late.

¹⁷⁷ See, e.g., David Cole, *The Value of Seeing Things Differently: Boerne v Flores and Congressional Enforcement of the Bill of Rights*, 1997 Supreme Court Review 31, 62 (noting that because the Court "is limited to deciding cases and controversies," it "is less free to set its own agenda and to address an issue comprehensively"); Robert L. Stern et al., *Supreme Court Practice* § 4.12, at 185 (7th ed 1993) ("Where the decision below holds a federal statute unconstitutional . . . certiorari is usually granted because of the obvious importance of the case."). Note that *Lopez*, *Seminole Tribe*, *Printz*, *CSB I*, and *Alden*—as well as the *Kimel*, *Brzonkala*, and *Condon* cases that the Court has on its docket this Term, see text accompanying notes 320–53—all are cases in which the invalidation of all or part of a federal statute on federalism grounds occurred first in the lower courts.

and Seth Kreimer have criticized the anticommandeering doctrine because it seeks to protect values that remain subject to attack by other means.¹⁷⁸ But simply because other federal instruments such as preemption or conditional spending threaten federalism values quite as much as commandeering does not render a strict prohibition on the latter “arbitrary.”¹⁷⁹ The asymmetry may reflect nothing more than the lack of a good case vehicle in recent years to tighten up the conditional spending doctrine. Or—more likely, in my view—the Court may feel more constrained in its ability aggressively to limit conditional spending without causing unwanted doctrinal reverberations elsewhere,¹⁸⁰ or to limit preemption without precipitating a direct conflict with Congress.¹⁸¹ The anticommandeering doctrine, by contrast, is confined to the federalism area and strikes at a tool which Congress has never used very much. To recognize these realities is hardly “arbitrary.” So long as the Court’s pursuit of such “targets of opportunity” does not trade off with superior doctrinal strategies or prompt harmful responses from Congress,¹⁸² it is not a persuasive criticism to observe that a given doctrine does not form part of a perfectly coherent or symmetrical structure.¹⁸³

¹⁷⁸ Adler and Kreimer, 1998 Supreme Court Review 71 (cited in note 118).

¹⁷⁹ See *id.* at 143 (characterizing the anticommandeering doctrine as “nothing more than some arbitrary rules of ‘etiquette’”).

¹⁸⁰ See text accompanying notes 275–79 (arguing that the Chief Justice’s unwillingness to recognize an unconstitutional conditions doctrine on issues of speech or abortion blocks any tightening of the conditional spending doctrine).

¹⁸¹ It is hard to imagine much in the way of a meaningful substantive limit on Congress’s preemption authority that would remain faithful to the text of the Supremacy Clause. That is no doubt why preemption doctrine has generally pursued a process federalism model. See also Gardbaum, 79 Cornell L. Rev. at 807–12 (cited in note 117) (proposing to narrow the scope of federal preemption but working within the paradigm of implementing the preemptive intent of Congress).

¹⁸² I argue below that the sovereign immunity decisions may in fact have these deleterious effects. See text accompanying notes 261–87. To the extent that the anticommandeering doctrine shares many characteristics of immunity federalism, see text accompanying notes 152–55, it may have similar liabilities. But these do not spring from the doctrinal asymmetries complained of by Adler and Kreimer.

¹⁸³ I do not wish to suggest that judges need not be principled in pursuing doctrinal targets of opportunity. (On a related point, see text accompanying notes 314–19.) But it is hardly unprincipled to recognize that the Constitution resists grand unified theories, see Adrian Vermeule and Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 Harv L. Rev. 730, 749–57 (2000), or that law is sometimes best developed incrementally, see Young, *Rediscovering Conservatism*, 72 NC L. Rev. at 653–56, 680, 712 (cited in note 175).

B. PROCESS FEDERALISM'S UNTAPPED POTENTIAL

The point of the preceding discussion is to say that the Court need not always definitively choose among federalism models. Instead, it can and ought to proceed in an incremental, common law fashion—beginning, so to speak, with the “low hanging fruit” before moving on to more doctrinally aggressive steps. The Court’s current focus on immunity federalism, however, may be causing it to miss the potential of process federalism doctrine significantly to protect state regulatory authority without requiring any aggressive doctrinal advances on the order of a *New York* or *Seminole Tribe*.

The Court’s decision last Term in *Iowa Utilities Board* is a particularly dramatic example.¹⁸⁴ In the 1996 Telecommunications Act, Congress broadly sought to open up local telephone markets to competition by preempting state-law monopolies over local phone service and requiring incumbent monopolists to facilitate market entry by granting competitors access to their networks. Although the 1996 Act contained the broad outlines of the new competitive regime, it was less than crystal clear as to who would articulate the details. The primary question in *Iowa Utilities Board* was whether Congress had intended to delegate this authority to the Federal Communications Commission or to the various state utility commissions. Given the economic importance of local telephone service, as well as the fact that local communications had been a bastion of state regulatory authority for over a hundred years,¹⁸⁵ the stakes for the states could hardly have been higher.

In terms of practical impact on state power, it is surely fair to describe *Iowa Utilities Board* as the biggest federalism case of last Term. And it would have been relatively straightforward to write a classic process federalism opinion ruling against the FCC’s jurisdiction. Although the Act’s text was ambiguous as to who should have rulemaking authority under it,¹⁸⁶ one might have thought (and

¹⁸⁴ *AT&T Corp. v Iowa Utilities Bd.*, 119 S Ct 721 (1999).

¹⁸⁵ See 119 S Ct at 738 (noting that the issues implicated markets worth “tens of billions of dollars”); *id* at 741 (Thomas concurring in part and dissenting in part) (observing that “[s]ince Alexander Graham Bell invented the telephone in 1876, the States have been, for all practical purposes, exclusively responsible for regulating intrastate telephone service”).

¹⁸⁶ See 119 S Ct at 738 (majority opinion) (“It would be gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction.”).

one dissenter argued) that such ambiguity would trigger the presumption against preemption.¹⁸⁷ Even more compelling, the Communications Act of 1934 (into which Congress inserted the 1996 Act) contained an express provision that “nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service.”¹⁸⁸ The Supreme Court had previously construed that provision as not only a “substantive jurisdictional limitation on the FCC’s power,” but also “a rule of statutory construction” requiring “unambiguous” and “straightforward” evidence before permitting a finding of FCC jurisdiction over intrastate matters.¹⁸⁹ It is hard to imagine a more Wechslerian instance of Congress voluntarily subordinating national power to state autonomy, and one would have expected a Court mindful of process federalism to enforce this concession strictly on the states’ behalf, particularly as against an unrepresentative federal agency with bureaucratic incentives to maximize its own power.

To be sure, *Iowa Utilities Board* was a complicated and difficult case on the merits, and one critical characteristic of the presumption against preemption is that it can be overcome by an adequate showing of Congressional intent. I do not wish to argue definitively that the majority failed to make that showing; rather, the

¹⁸⁷ See *id.* at 749–50 (Breyer concurring in part and dissenting in part) (citing *Cipollone v Liggett Group, Inc.*, 505 US 504, 518 (1992), and *Rice v Santa Fe Elevator Corp.*, 331 US 218, 230 (1947)). Justice Scalia’s answer to this point for the Court was that the 1996 Act clearly did preempt the existing state regulatory regime, and that the presumption against preemption therefore did not extend to the issue of what regulatory authority the states might retain in the wake of that preemption. See 119 S Ct at 730 n 6. But this seems equivalent to the debate in *Cipollone* about whether the presumption applies to restrict the scope of preemption in a statute that includes an express preemption clause. See 505 US at 533 (Blackmun concurring in part and dissenting in part). Justice Scalia likewise argued there that the presence of an express preemption clause overcame and therefore exhausted any presumption against preemption, so that such a presumption could not require a narrow construction of the preemption clause itself. *Id.* at 545 (Scalia concurring in the judgment in part and dissenting in part). But that view was expressly rejected in *Cipollone* by a majority of the Court. *Id.* at 518; *id.* at 533 (Blackmun concurring in part and dissenting in part). See also Tribe, 1 *American Constitutional Law* § 6-29, at 1195 n 74 (cited in note 29) (concluding that “there seems no reason to dissolve established presumptions against broad preemption of state regulation when interpreting *any* portion of a federal statute”).

¹⁸⁸ 47 USC § 152(b).

¹⁸⁹ *Louisiana Public Service Comm’n v FCC*, 476 US 355, 372–73 (1986). The Eighth Circuit below had relied upon *Louisiana* and § 152(b) to reject FCC jurisdiction, concluding that § 152(b) erected a fence that is “hog tight, horse high, and bull strong, preventing the FCC from intruding on the states’ intrastate turf.” *Iowa Utilities Board v FCC*, 120 F3d 753, 800 (8th Cir 1997), *rev’d*, 119 S Ct 721 (1999).

important point is that plausible arguments were available for the states' position. In such circumstances, it is odd to see a majority opinion written by Justice Scalia (the author of *CSB I* and *Printz*) and joined by Justice Kennedy (the author of *Alden*) simply give the federalism arguments in the case the back of the hand.¹⁹⁰ Indeed, only Justice Breyer stuck up for the process federalism values inherent in the presumption against preemption.¹⁹¹ Given the importance of the regulatory authority at issue to both the states and the federal government, surely the case warranted at least a more searching review of the federalism issues at stake.

It seems fair to characterize *Iowa Utilities Board* as a missed opportunity in the Court's continuing effort to develop a workable set of federalism doctrines. The majority's interpretation of the Telecommunications Act represents a considerably greater encroachment upon traditional state authority than other federal statutes that the Court has found unacceptable. As Justice Breyer observed, "[t]oday's decision does deprive the States of practically significant power, a camel compared with *Printz's* gnat."¹⁹² One explanation for this irony may be that, in cases like *Iowa Utilities Board*, issues of federalism become subordinated to different divisions—such as the debate over the appropriate level of deference to agency interpretations of law—that implicate wholly different coalitions on the Court.¹⁹³

¹⁹⁰ Justice Scalia called the appeals to "States' rights" by Justices Thomas and Breyer in dissent "most peculiar" because even if the Act were interpreted to leave rulemaking authority with the states, that authority would have been subject to federal judicial review under federal statutory standards. See 119 S Ct at 730 n 6. But this argument is "peculiar" in its own right, since judicial review of agency rulemaking is typically narrow; cf. *Motor Vehicle Mfrs. Assn. of United States, Inc. v State Farm Mut. Automobile Ins. Co.*, 463 US 29 (1983), and the availability of federal judicial review is not typically thought of as eliminating all state regulatory interests in other areas (such as state criminal trials, which are subject to review by federal district courts on habeas corpus and by the U.S. Supreme Court on direct review).

¹⁹¹ Justice Thomas (joined by the Chief Justice as well as Justice Breyer) went to great lengths to avoid invoking that presumption by relying instead on other statutory canons and the statutory interpretive rule in § 152(b). See 119 S Ct at 744 (Thomas concurring in part and dissenting in part). Justice O'Connor, the author of *Gregory*, did not participate in the case. The best way to explain Justice Breyer's position is probably his evident belief that, in this context, a regime offering diverse approaches accommodated to local conditions and the opportunity for experimentation in different states makes good practical sense. See id at 748 (Breyer concurring in part and dissenting in part).

¹⁹² Id at 753.

¹⁹³ Compare, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin L Rev 363, 373–82 (1986) (criticizing *Chevron* and urging a narrow reading), with Antonin

Another explanation might be that while the Court's conservatives were once willing (in *Gregory*, for example) to accept process federalism as half a loaf, they are now confident enough of their strength to abandon process federalism in favor of more aggressive models of federalism doctrine. That, in my view, would be a mistake. Process federalism has the important advantage of recognizing that, at the end of the day, the states must rely primarily—even if not exclusively—on the political process for protection of their authority. No one, after all, expects the Court to undertake a pre-1937-style frontal assault on federal power.¹⁹⁴ Process federalism also ought to have a sort of “least common denominator” acceptability to Justices who believe, for instance, that *Garcia* was rightly decided.¹⁹⁵ To the extent that process federalism retains the capacity to protect important spheres of state regulatory authority in particular cases—and *Iowa Utilities Board* demonstrates that it does—it ought to remain part of the Court's doctrinal repertoire.

IV. COLLEGE SAVINGS BANK AND THE VIRTUES OF POWER

If last Term's Court chose not to strike a blow for process federalism in *Iowa Utilities Board*, it made significant contributions to power federalism in the companion *College Savings Bank* opinions. At first glance, of course, *College Savings Bank* is an immunity decision. *College Savings Bank* applied the principles of *Seminole Tribe* to two important federal statutes and, therefore, may have rammed home *Seminole Tribe*'s significance for federal law generally.¹⁹⁶ But *College Savings Bank* made little new Eleventh Amendment law. The cases' major contribution is, instead, in narrowing the scope of Congress's substantive lawmaking power under Section 5 of the Fourteenth Amendment. The *College Savings Bank* opinions may thus have primary significance as “power federalism”

Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L J 511, 516–21 (praising *Chevron* and arguing for a broad reading).

¹⁹⁴ See, e.g., *United States v. Lopez*, 514 US at 555–57 (reaffirming the New Deal precedents reading the commerce power broadly); id at 573–74 (Kennedy concurring) (same). See also sources cited in note 232 (reading *Lopez* as a mere warning to Congress that *some* limits exist).

¹⁹⁵ In addition to Justice Breyer's dissent in *Iowa Utilities Board*, see *Gade v. National Solid Wastes Mgt. Assn.*, 505 US 88, 116–17 (1992) (Souter dissenting) (applying a very strong version of the presumption against federal preemption).

¹⁹⁶ *Seminole Tribe* itself, after all, dealt with the rather obscure Indian Gaming Regulatory Act, 25 USC § 2710.

cases that limit Congress's power not only to subject the states to private suits, but also to supplant state regulatory authority over private conduct. As a result, *College Savings Bank* advances protection of core state interests in a way that, I will argue below, *Alden* does not.

A. STATE REGULATORY AUTHORITY AND THE REAL POLITICAL
SAFEGUARDS OF FEDERALISM

States have a variety of interests that include, for example, maintaining autonomy over their internal structure and allocation of resources or preserving their dignity as “sovereign” entities. My central argument, however, is that the most important interest of the states lies in making sure that, despite the proliferation of federal activity, they retain something to *do*. This is true regardless of which underlying values federalism is thought to serve. If one chooses to emphasize the values of decentralized decision making—such as facilitating experimentation, diverse outcomes, or public participation¹⁹⁷—then the importance of giving state governments meaningful decisions to make should be obvious. But even if one stresses the mere existence of state governments as an institutional counterweight to central authority,¹⁹⁸ state regulatory authority over private individuals is probably equally or even more important than the preservation of state governments’ internal integrity.

The states’ fundamental interest in regulating private conduct and providing benefits to private individuals traces back to Madison’s original version of the “political safeguards of federalism.”¹⁹⁹ Although Madison did place some weight upon the institutional “dependence” of federal officials on state governments,²⁰⁰ his primary reliance was upon the loyalty of the people themselves. He thus rebuffed the antifederalist call for more explicit structural protection for state prerogatives:

¹⁹⁷ See, e.g., Merritt, 88 Colum L Rev at 7–9 (cited in note 107).

¹⁹⁸ See, e.g., *id* at 3–7.

¹⁹⁹ See *Garcia v San Antonio Metropolitan Transit Auth.*, 469 US 528, 571 (1985) (Powell dissenting) (“The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective ‘counterpoise’ to the power of the Federal Government . . . because they would attract and retain the loyalty of their citizens. The roots of such loyalty, the Founders thought, were found in the objects peculiar to state government.”).

²⁰⁰ See Federalist 45, at 291 (Madison).

The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject. . . . They must be told that the ultimate authority . . . resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth, no less than decency, requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constituents.²⁰¹

Madison understood that federal representatives will protect the interests of state governments only if and to the extent that their own constituents are loyal to those governments and care about the preservation of state prerogatives. This reliance on popular loyalty should not worry the states, Madison argued, because “[m]any considerations . . . seem to place it beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States.”²⁰² These included Madison’s prediction that the states would have larger governmental establishments than the central government, would therefore be able to dispense more patronage, and would have closer ties to the community as a result.²⁰³

All of these predictions presuppose a viable and active state government—a government, so to speak, with a lot going on. They thus emphasize the centrality of an additional consideration advanced by Madison: the fact that “[b]y the superintending care of [state governments], all the more domestic interests of the people will be regulated and provided for.”²⁰⁴ Madison had emphasized this advantage of state governments in *The Federalist* 45 as well, where he noted that

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several States will extend to all the ob-

²⁰¹ Federalist 46, at 294 (Madison).

²⁰² Id.

²⁰³ Id. at 294–95.

²⁰⁴ Id.

jects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.²⁰⁵

The People will be loyal to the states, in other words, because it is the states that oversee and regulate the things that matter in the ordinary lives of individual citizens.²⁰⁶ States build schools, enforce contracts, catch criminals.²⁰⁷ In order to maintain loyalty, then, the states must continue to have primary authority to provide services to private individuals and regulate private conduct.²⁰⁸

Without such authority, the basis for political loyalty to state governments—and consequently the influence of state governments in the national political process—evaporates. Madison and the other federalists thus assumed, as Robert Nagel has observed, that “to be able to protect themselves in the political process states would need (and were assured under the proposed Constitution) the capacity to elicit loyalty by providing for the needs of their residents.”²⁰⁹ Even assuming that political safeguards are the primary check on federal power, then, process federalism is incomplete without some concern for preserving enough substantive state regulatory authority for state governments to remain a meaningful presence in the consciousness of their citizens.²¹⁰

²⁰⁵ Federalist 45, at 292–93 (Madison). Hamilton similarly observed that because state governments “regulat[e] all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake,” the states are assured of possessing the “affection, esteem, and reverence” of their citizens. Federalist 17, at 120 (Hamilton).

²⁰⁶ In fact, Madison argued, if the federal government did its job and kept the nation out of foreign trouble, it wouldn’t have much to do at all. See *id.* at 293.

²⁰⁷ See, e.g., Kramer, 47 Vand L Rev 1504 (cited in note 105) (observing that “[t]he law that most affects most people in their daily lives is still overwhelmingly state law—except perhaps law professors, for whom it is easier to study one federal system than many state systems, and who may, therefore, have a somewhat warped perspective”).

²⁰⁸ See Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 Supreme Court Review 81, 100 (“[T]he Federalists understood and emphasized that influence through electoral politics presupposes that state governments would exist as alternative objects of loyalty to the national government. Unless the residents of the states and their political representatives understand that states are entitled to claim governmental prerogatives and unless they perceive states as legitimate, separate governments, there will be no impulse to use political influence to protect the interests of states as governmental entities.”).

²⁰⁹ *Id.* at 103.

²¹⁰ See Rapaczynski, 1985 Supreme Court Review at 404 (cited in note 105) (“Naturally, the vitality of the participatory state institutions depends in part on the types of substantive decisions that are left for the states. Should the federal government preempt them from most fields that touch directly on the life of local communities, the states would become but empty shells within which no meaningful political activity could take place.”).

Madison's view comports with basic insights drawn from contemporary public choice theory.²¹¹ Under the "economic theory of regulation," politicians obtain political support from interest groups in exchange for providing regulation that benefits those groups.²¹² It follows that political support will track regulatory authority. If state regulatory authority declines—especially in comparison with federal authority—one would expect interest groups to shift their support to federal politicians.²¹³ The ability of state governments to protect their own interests in the political process by relying on the backing of private groups would correspondingly decline as well.

One might plausibly suggest, in response to these sorts of arguments, that the states' basic regulatory responsibilities are so well entrenched as to foreclose any significant threat to their political support. Certainly state governments continue to have a great deal to do, despite radical expansion of federal authority since the New Deal.²¹⁴ But consider the following list of "standard day-to-day public goods" offered by state governments: "education, roads, some public utilities, trash collection, police and fire protection, rules governing sexuality and families, zoning, and nuisance abatement."²¹⁵ Almost every one of these "police powers" has recently been subject to actual or proposed federal encroachment.²¹⁶ Surely

²¹¹ A number of scholars have noted the "continuity [of public choice theory] with the thought of the Framers." John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 Harv J L & Pub Pol 195, 195 (1997). See also Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U Chi L Rev 1484, 1492 (1987) (observing that public choice theory "lays the theoretical groundwork for an appreciative appraisal of the founders' thought").

²¹² See, e.g., Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 Va L Rev 265, 269 (1990).

²¹³ Federal politicians may indeed seek to further their own interests by affirmatively promoting such a shift. See sources cited in note 105 (noting competition between state and federal representatives).

²¹⁴ See Bednar and Eskridge, 68 S Cal L Rev at 1469 (cited in note 106) (noting a "constitutional cliché that ordinary 'police powers' are presumptively left to state and local governments").

²¹⁵ Id at 1469 n 95.

²¹⁶ See, e.g., *AT&T Corp. v Iowa Utilities Board*, 119 S Ct 721 (1999) (upholding FCC jurisdiction over local phone service); Defense of Marriage Act, 104 PL 199, 110 Stat 2419 (September 21, 1996) (articulating a federal definition of "marriage" to exclude homosexuals); Jeneba Jalloh, Comment, *Local Tower Siting Preemption*, 5 CommLaw Conspectus 113 (1997) (discussing federal preemption of local land use regulation under the 1996 Telecommunications Act); Michael Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy*, 63 Fordham L Rev 345 (1994) (discussing increasing federal

it would be difficult to claim today—as Wechsler did in 1954²¹⁷—that Congress gives much weight to any general presumption in favor of state regulation. Excessive complacency about the future of state regulatory authority thus seems as wrongheaded as the fear that such authority will collapse tomorrow.²¹⁸

Madison's understanding of the relationship between state and federal politics suggests that any viable set of federalism doctrines must develop and maintain meaningful limits on federal ability to supplant state regulatory authority.²¹⁹ I will argue in Part V that sovereign immunity holdings such as *Alden* are comparatively *unimportant* to this effort. *College Savings Bank*, however, addresses not only the states' immunity but also the substantive limits of Congress legislative authority under Section 5. I consider those limits in the next section.

B. THE APPROPRIATE SCOPE OF SECTION 5

The relevance of the Section 5 power to state authority over private conduct is not completely obvious. Unlike the commerce power, Section 5 gives Congress no authority to regulate private conduct itself; rather, it allows Congress to regulate the behavior of other governmental bodies to enforce their compliance with the Constitution.²²⁰ If Congress believes that state governments are

role in education policy); Kilbourne, 5 Geo J Fighting Poverty 327 (cited in note 126) (discussing proposed extensive federal regulation of family law under the International Convention on the Rights of the Child).

²¹⁷ See Wechsler, 54 Colum L Rev at 544 (cited in note 103) (“National action has . . . always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case.”).

²¹⁸ As Professor Tribe famously observed in 1978, “no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.” Laurence H. Tribe, *American Constitutional Law* 302 (Foundation Press, 1st ed 1978).

²¹⁹ See *Garcia*, 469 US at 572 (Powell dissenting) (arguing that “by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government”).

²²⁰ However, in the Violence Against Women Act (VAWA), 42 USC § 13981, Congress appears to have taken the position that it may remedy unconstitutional state regulatory behavior toward private parties by assuming the state's regulatory role for itself. The VAWA responds to the alleged failure of state court systems adequately to respond to violence against women by creating a federal remedy not against the supposedly deficient state judicial systems, but against the private perpetrators of the violence. The Court will consider the constitutionality of the VAWA this term. See *Brzonkala v Virginia Polytechnic Institute*, 169 F3d 820 (4th Cir 1999) (en banc), cert granted, 1999 US LEXIS 4745.

regulating private conduct in an unconstitutional way, however, Section 5 confers the federal power to preempt that regulation or prescribe federal norms to which it must conform. If, for example, a state allocated land-use permits in a racially discriminatory fashion, Congress would have the power to preempt that permitting regime or prescribe federal requirements for its continued operation.²²¹

In order to see the significance of *College Savings Bank* for limiting Congress's Section 5 powers, it helps to consider the alternatives to the Court's holding. The government's position in *College Savings Bank* threatened to unlimit the Section 5 power in two ways. First, the government argued that, because the Fourteenth Amendment protects property interests, Congress may legislate whenever a property interest is arguably at stake. The interest asserted by the bank—in securing its business from false advertising by others—was ephemeral at best. Had the Court accepted this theory, Congress would have a basis for preempting any state regulatory policy that, in Congress's view, imposed excessive burdens on commercial interests. While Congress could probably reach most such activity under the Commerce Clause, allowing Section 5 to become virtually coextensive with the commerce power would defeat any ongoing effort by the Court to articulate some sort of limits on the latter.²²²

The holding of *CSB II*—and therefore the implications of a ruling the other way—are somewhat more difficult to pin down. As I have discussed, *CSB II* may be read as holding that (1) Congress may “remedy” constitutional violations under Section 5 only after a demonstration that such violations are in fact widespread, or, more narrowly, that (2) Congress may remedy state deprivations of property only when the states have failed to provide an adequate

²²¹ A court, of course, could likewise prohibit such unconstitutional state practices by awarding injunctive relief in a suit challenging the practice. Section 5 arose in part out of suspicion that the courts would not reliably enforce Fourteenth Amendment guarantees on their own. See Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 Mont L Rev 145, 158–62 (1995). It is also clear that Congress's remedial authority extends somewhat further than the relief that a court might grant. See *City of Boerne v Flores*, 521 US 507, 517–18 (1997).

²²² Compare Cole, 1997 Supreme Court Review at 55 (cited in note 177) (acknowledging that “[t]he potential sweep of Section 5, when combined with the effects of incorporation, is dramatic”).

remedy.²²³ The alternative holdings in either event—that Congress could act to avert merely hypothetical constitutional violations, or to redress violations for which the states have already provided a remedy—would render Section 5 a far-reaching grant of power indeed. Congress could, for example, broadly preempt state land-use or environmental regulation (to prevent takings of property²²⁴), enact a national code governing punitive damages (to prevent substantive due process violations²²⁵), or even ban the death penalty for state crimes (to prevent the unconstitutional execution of someone who might actually be innocent²²⁶). This would be true, under the government’s theory in *CSB II*, even though constitutional violations in each of these areas have generally been adjudged to be few and far between, and the states tend to provide procedures to deal with allegations of unconstitutionality.

College Savings Bank’s requirement that Congress show that violations are widespread and/or unremedied by state procedures, as well as its somewhat narrow definition of protectable property rights, thus help to preserve significant areas of state regulatory authority from preemption under Section 5. Some of these areas may nonetheless fall within other enumerated powers, but it seems better to have a forthright debate over the proper scope, say, of the Commerce Clause than to allow Section 5 to evolve into a blank check available to avoid whatever commerce limits may exist. Moreover, such an interpretation may strengthen Section 5 as well by restricting invocations of that power that fall far from its core historical justification. The battles of the Civil War and Reconstruction, after all, were not fought to assert federal supremacy over false advertising.

It seems at least plausible, in this regard, that the breadth of the Section 5 power may ultimately trade off with its depth. The

²²³ See text accompanying notes 63–65. Note that these two requirements are not mutually exclusive; the Court may be intending to require that both conditions be met.

²²⁴ See *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992) (recognizing that environmental or land-use regulation may violate the Takings Clause in particular instances); *Nollan v California Coastal Comm’n*, 483 US 825 (1987) (same).

²²⁵ See *BMW of North America, Inc. v Gore*, 517 US 559 (1996) (recognizing that some punitive damages awards or procedures may violate the Due Process Clause); *Honda Motor Co., Ltd. v Oberg*, 512 US 415 (1994) (same).

²²⁶ See *Herrera v Collins*, 506 US 390 (1993) (recognizing that the execution of someone who is actually innocent may be unconstitutional).

argument is analogous to Vincent Blasi's contention that the Free Speech Clause acts as a more effective check on real threats to core First Amendment values (such as political expression) if judicial protection is not extended to more controversial forms of expression that lie far from this core.²²⁷ This argument has been controversial, and it may not translate perfectly to the context of legislative enforcement, but there are some reasons to think that Blasi's point may be germane to Section 5 doctrine. A critical current question concerning that doctrine, for example, is whether general federalism limits formulated in the Commerce Clause context, such as the anticommandeering principle, should limit Congress's power under Section 5.²²⁸ It is much easier to hold that Section 5 is "special"—and therefore warrants an exception to *New York and Printz*—if the Section 5 is a narrow, focused power rather than a general grant of regulatory jurisdiction comparable to the commerce power in scope.²²⁹ Similarly, *Fitzpatrick's* holding that Congress may abrogate the states' sovereign immunity pursuant to Section 5 is much easier to defend in a post-*Seminole Tribe* world if Section 5 is not read as permitting a general end run around limits governing the commerce power. To the extent that *College Savings Board* helps maintain the narrowness and "specialness" of Section 5, then, that power may remain more effective with respect to its core purposes.²³⁰

V. ALDEN AND THE TROUBLE WITH IMMUNITY FEDERALISM

While the *College Savings Bank* opinions respond to the states' core interest in preserving their own regulatory authority,

²²⁷ See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum L Rev 449 (1985).

²²⁸ See Adler and Kreimer, 1998 Supreme Court Review at 119–33 (cited in note 118) (arguing that anticommandeering should not apply to Section 5). The question was noted, but not decided, in *Pennsylvania Department of Corrections v. Yeskey*, 118 S Ct 1952 (1998).

²²⁹ One way in which the Court has sought to enforce the "specialness" of Section 5 is by refusing to presume that Congress has invoked its Section 5 power absent a clear congressional statement to that effect. See *Pennhurst State School and Hosp. v. Halderman*, 451 US 1, 16 (1981).

²³⁰ The point may also work in reverse: If a pro-federalism Court is forced to recognize every extension of individual rights vis-à-vis state authority as also entailing a broadening of Congress's legislative power, the Court may be tempted to be more parsimonious in its articulation of rights.

the same cannot be said of *Alden*. The Court's argument in *Alden* relied not only on history and political theory, but also on a cluster of related points concerning the present needs of the states as actors in the federal system. These concerns included the impact on a state's "dignity" of being subjected to coercive judicial process, the threat of money damages to the "financial integrity" of the states, and the importance of ensuring that state governments and their constituents—not private litigants—remain in control of "the allocation of scarce resources among competing needs."²³¹ None of these arguments is wholly implausible; private lawsuits, no doubt, at times impose real hardships on state governments. But in attempting to insulate the states from outside interference in the form of private lawsuits, the Court is pursuing a model of federalism that ultimately promises little protection for the states' most fundamental interests.

A. HOW HELPFUL IS IMMUNITY?

The Court's decision in *Alden*, following on the heels of *Seminole Tribe* just three Terms back, may signify that immunity federalism is the Court's new strategy of choice for preserving, or reestablishing, some balance between state and nation. *Lopez* seems, for now at least, important mostly as a "warning shot across [Congress's] bow"—a reminder that substantive limits *do* exist on Congress's authority, but not necessarily a judicial commitment to enforce those limits aggressively.²³² And, as I have noted, one simply does not see the sustained and consistent effort to enforce process values (aside from their role in the anticommandeering cases) that characterizes the Court's immunity-based jurisprudence.²³³ It is far from

²³¹ *Alden v Maine*, 119 S Ct 2240, 2264 (1999).

²³² Meltzer, 1996 Supreme Court Review at 63 (cited in note 17). A wide range of commentators have interpreted *Lopez* in this way. See also Bednar and Eskridge, 68 S Cal L Rev at 1484 (cited in note 106). We will know more about whether this view is correct when the Court revisits *Lopez* this term. See text accompanying notes 332–37 (discussing *Brzonkala v Virginia Polytechnic Institute*, 169 F3d 820 (4th Cir 1999) (en banc), cert granted, 1999 US LEXIS 4745, in which the Fourth Circuit struck down the Violence Against Women Act, 42 USC § 13981, on *Lopez* grounds, and *United States v Jones*, 178 F3d 479 (7th Cir), cert granted, 120 S Ct (1999), in which the Seventh Circuit rejected a *Lopez* challenge to the federal arson statute, 18 USC § 844(i)).

²³³ See text accompanying notes 190–95. *Gregory v Ashcroft*, 501 US 452 (1991), for example, could have been read broadly to suggest that limits on federal authority would be enforced through statutory construction. But we have seen few cases extending *Gregory*. Frequently, the "clear statement" strategy illustrated in *Gregory* has been employed to prevent state governments from being held accountable to federal law. See, e.g., *Will v Michigan*

obvious, unfortunately, that the immunity model offers the best means for protecting federalism as we enter the next century.

The central problem with immunity federalism is that the Court's analysis begins by inquiring what state "sovereignty" might mean in isolation, then develops the proper relationship between the states and the federal government by inference from there. Andrzej Rapaczynski identified a similar problem with the *National League of Cities* doctrine over a decade ago, arguing that the Court should begin instead with "a functional analysis of the role of the states in the federal system."²³⁴ The problem is that the classical concept of "sovereignty" has never described any institution of American government very well, and the extensive qualifications and adaptations that the term must suffer in order to apply here at all strip the concept of most of its explanatory power.²³⁵

In practice, discussions of "sovereignty" in immunity federalism cases frequently reduce to reliance on states' "dignitary" interests.²³⁶ States have, of course, a wide range of interests and prerogatives not shared by individuals in our constitutional system. But these arise from the necessary functions performed by the states in service to the ultimate sovereign—the people.²³⁷ As Justice Wil-

Dept. of State Police, 491 US 58, 65–66 (1989) (refusing to find, absent a clear statement of Congress's intent, that a state is a "person" liable under § 1983). And in other areas where the Court arguably *has* struck a blow for process federalism, the Court has not articulated that as a rationale for its decision. See, e.g., *Yamaha Motor Corp. v. Calhoun*, 516 US 199 (1996) (holding that judge-made federal admiralty law did not preempt state tort remedies, but not relying on need to restrict preemptive lawmaking to Congress's own enactments); Ernest A. Young, *The Last Brooding Omnipresence: Erie Railroad Co. v. Tompkins and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 St Louis U L J 1349, 1354–55 (2000) (arguing that process federalism is sufficient to protect state interests vis-à-vis federal admiralty law).

²³⁴ Rapaczynski, 1985 Supreme Court Review at 345 (cited in note 105). Rapaczynski's further point that such an analysis "would parallel the Court's jurisprudence in the area of separation of powers," *id.* is illuminating, although it must be qualified by the recognition of several separation of powers decisions of a more formalist cast. See, e.g., *Bowsher v. Synar*, 478 US 714 (1986); *INS v. Chadha*, 462 US 919 (1983).

²³⁵ See Rapaczynski, 1985 Supreme Court Review at 346–59 (cited in note 105). Rapaczynski acknowledges that the Framers *did* think it important to have some theory of sovereignty and in fact located that sovereignty in the people themselves. See *id.* at 357. See also sources cited in notes 237–38. But he rightly points out that a concept of *delegated* state sovereignty emanating from the people is so different from classical sovereignty theory as to severely undermine the classical theory's usefulness today. See *id.* at 357–58.

²³⁶ See, e.g., *Alden v. Maine*, 119 S Ct 2240, 2264 (1999); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 US 261, 268 (1997) (plurality opinion).

²³⁷ On the ultimate sovereignty of the people, see, e.g., Federalist 49, at 339 (Madison) (asserting that "the people are the only legitimate fountain of power"); 1 *Pennsylvania and*

son, the primary architect of popular sovereignty, insisted in *Chisolm*, “[a] State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance.”²³⁸ A state has an interest in preserving the integrity of its internal decision-making processes, for example, because that will insure that it remains responsive and accountable to its citizens and not to some other body.²³⁹ It is simply an extraordinary statement, in our political tradition, to suggest that any governmental entity has a “dignity” intrinsically superior to that of the individual. There are no kings here.²⁴⁰

To be worthy of constitutional protection, then, surely a state’s “dignitary” interest in avoiding private lawsuits must somehow be linked to its ability to carry out its governmental functions.²⁴¹ Perhaps, for example, dignity would be a credible interest if one could demonstrate that the sheer spectacle of the state appearing as defendant in a civil trial would decrease public respect for the state’s efforts at governance. But this is an empirical demonstration of likely insurmountable difficulty, and to my knowledge it has never been attempted. “Dignity” therefore seems a relatively weak basis for striking down a duly enacted federal law.

Equally plausible arguments, moreover, suggest that “dignity”—defined as the credibility of public institutions—might cut

the Federal Constitution, 1787–1788, at 302 (J. McMaster and F. Stone, eds, 1888) (quoting James Wilson’s insistence that sovereignty “resides in the PEOPLE, as the fountain of government”); Gordon Wood, *The Creation of the American Republic, 1776–1787*, at 530–32 (1969) (observing that Wilson’s theory of the sovereignty of the people “would eventually become the basis of all Federalist thinking”).

²³⁸ *Chisolm v Georgia*, 2 US (2 Dall) 419, 455 (1793) (opinion of Wilson). Justice Souter echoed these sentiments in his *Alden* dissent:

It would be hard to imagine anything more inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own. Whatever justification there may be for an American government’s immunity from private suit, it is not dignity.

Alden v Maine, 119 S Ct 2240, 2289 (Souter dissenting). See Gerald Neuman, *Human Dignity in United States Constitutional Law* (unpublished manuscript) (pointing out the juxtaposition of Justices Wilson and Souter).

²³⁹ See Rappaport, 93 Nw U L Rev at 844 (cited in note 122) (arguing that state political systems must remain effective in order for states to check central authority).

²⁴⁰ See *No More Kings*, in *Schoolhouse Rock! America Rock* (video) (25th Anniversary ed 1995).

²⁴¹ Private lawsuits may, of course, affect a state’s governmental functions directly—by depleting the state’s treasury, for instance. I discuss the states’ interests in avoiding these sorts of impacts in the text accompanying notes 254–56. But the invocation of “dignity” is entirely superfluous to the identification and evaluation of these practical sorts of interests.

in favor of civil liability. In our constitutional tradition, confidence in the government arises rather directly from the proposition that the government is subject to the rule of law.²⁴² The earliest authorities on sovereign immunity knew this; that is why the ancient maxim that “the King can do no wrong” originally meant “that the king must not, was not allowed, not entitled to do wrong.”²⁴³ Legitimate government, in other words, is *accountable* government.

For a more prosaic example, one need only look as far as the state debt cases that dominated the jurisprudence of sovereign immunity in the eighteenth and nineteenth centuries. The Eleventh Amendment was enacted largely to prevent suits against the states to recover debts incurred during the Revolution.²⁴⁴ And the late-nineteenth-century immunity cases culminating in *Hans* revolved around the massive debts incurred by Reconstruction-era state governments in the South.²⁴⁵ In each of these episodes, assertions of immunity can only have hurt the states’ “dignity” in the tangible sense of the credibility of the states’ financial obligations.²⁴⁶

In any event, the dignitary argument is far from compelling when placed in the context of modern sovereign immunity doctrine. First, the continuing availability of private suits against state officers undermines any dignitary gains from barring direct suits

²⁴² See, e.g., Rapaczynski, 1985 Supreme Court Review at 357 (cited in note 105) (arguing that accountability of government institutions is more central to the American political tradition than classical notions of sovereignty).

²⁴³ Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv L Rev 1, 4 (1963) (quoting Ludwik Ehrlich, *Proceedings Against the Crown* (1216–1377), in 6 *Oxford Studies in Social and Legal History* 42 (P. Vinogradoff ed. 1921)). See also 1 William Blackstone, *Commentaries* *246 (interpreting the maxim to mean that “the prerogative of the crown extends not to do any injury”); *Seminole Tribe of Florida v Florida*, 517 US 44, 103 n 2 (1996) (Souter dissenting) (noting this aspect of the history). This idea that the sovereign must be accountable was realized, at common law, through the petition of right—the precursor to modern officer suits. As I argue at text accompanying notes 247–48, the continued existence of officer suits undermines any claim that the state’s dignity is undermined by having to defend a private lawsuit.

²⁴⁴ See *Cohens v Virginia*, 19 US (6 Wheat) 264, 407 (1821).

²⁴⁵ See Orth, *The Judicial Power of the United States* at 53–57 (cited in note 17); Gibbons, 83 Colum L Rev at 1978–82 (cited in note 17).

²⁴⁶ Madison, e.g., argued that the states’ attempts to evade their debts by shifting to paper money “disgrace[d] Republican Govts in the eyes of mankind.” James Madison, *Notes for a Speech for the Virginia Assembly Opposing Paper Money* (Nov 1, 1786), in 9 Papers of James Madison 158 (Robert A. Rutland et al, eds, 1975). Compare *United States v Winstar Corp.*, 518 US 839, 884 (1996) (plurality opinion) (observing that undermining remedies for the government’s breach of its contracts would “produce the untoward result of compromising the Government’s practical capacity to make contracts, which we have held to be of the essence of sovereignty itself”) (internal quotation marks omitted).

against the state. The defendants in officer suits are frequently high-profile officials identified directly with the state by the public,²⁴⁷ and the state frequently undertakes the defense of the suit even though it is not a named defendant.²⁴⁸ Second, *Alden* surely presents the least compelling case for a dignitary injury. When the state is sued in its own courts, it has an opportunity to control the circumstances and atmospherics of the litigation in ways that are not available in federal court suits.²⁴⁹ Third, a possible consequence of the Court's immunity cases—an increase in suits against the states brought by the United States as plaintiff—may be even more damaging to dignitary interests than private litigation.²⁵⁰ Not only are such suits likely to be higher profile, but they also present the state as knuckling under to superior force, rather than graciously acceding of its own accord to the rule of law.²⁵¹

Most importantly, the immunity model's focus on dignity does little to protect state interests defined in terms of state regulatory authority. "Dignity" is not part of Madison's equation; a meaningful sphere of state governmental responsibility is. While immunity federalism focuses on foreclosing federal interference with state government activity within the state's sphere of responsibility, immunity does not itself guarantee the continued existence or extent of that sphere. It would be quite consistent with *Alden* (and with *National League of Cities*, for that matter) for the federal government to allow state governments to pay their employees whatever the state wishes, while preempting every field of state governmen-

²⁴⁷ In *Seminole Tribe*, e.g., the plaintiff tribe sought (unsuccessfully) to bring an officer suit against the governor of Florida. See 517 US at 73.

²⁴⁸ For those inclined to think that the absence of the state from the complaint's caption makes a difference in terms of preserving institutional dignity, consider our most prominent recent suit against a governmental official in his individual capacity: *Clinton v Jones*, 520 US 681 (1997). I am inclined to think that the dignity of the executive institution is enhanced by affirming the president's accountability to law. But can anyone doubt that the suit affected the dignity of the presidency as an institution—for good or ill—regardless of the fact that the president was not sued in his official capacity?

²⁴⁹ The state can control, for example, whether the proceedings are televised, or the venue in which they take place, by articulating such rules in its general procedures governing suits against the sovereign.

²⁵⁰ See text accompanying notes 280–82 (discussing suits brought by the United States).

²⁵¹ Where the state's sovereign immunity is preempted (as the federal government argued in *Alden*), the state is, in fact, yielding to federal supremacy. But yielding to the binding force of federal law seems somehow more graceful than yielding only to an actual federal enforcement action brought by the federal executive.

tal activity in which those employees had formerly been occupied. A more realistic example is that the increasing deference to state courts shown by the Supreme Court's recent habeas jurisprudence does nothing to stop the drain of substantive responsibility from the state courts due to the federalization of crime.²⁵² Immunity federalism thus poses the same problem that Laurence Tribe has identified with respect to *Coyle v Smith*'s rule that the federal government may not dictate the location of a state capitol: Such limits "encompass little beyond the continued formal existence of separate and independent states. If states are to have any real meaning, Congress must also be prevented from acting in ways that would leave a state formally intact but functionally a gutted shell."²⁵³

The Court's sovereign immunity jurisprudence, of course, does considerably more to protect state prerogatives than *Coyle*; as the Court pointed out in *Alden*, immunity from suit does protect the state's ability to perform its basic responsibilities in important ways. Immunity protects the state treasury and ensures that state officials, not private litigants or courts, decide which claims merit the allocation of scarce public resources and which do not.²⁵⁴ These benefits are real and have a direct relation to Madison's concerns about the ability of state governments to meet the needs of their citizens.²⁵⁵ There are countervailing drawbacks, however. Immu-

²⁵² State courts, of course, currently have little cause to mourn any decrease in their criminal dockets resulting from federalization. But on the day that state governments cease to be seen by citizens as the primary guarantors of public safety, a considerable part of the predicate for loyalty that Madison deemed so essential will have ceased to exist. And of course the reason driving the federalization of crime is the wish of federal politicians to take credit for crime-fighting measures. See, e.g., Ann Althouse, *Enforcing Federalism After United States v Lopez*, 38 Ariz L Rev 793, 812–13 (1996).

²⁵³ Tribe, *Second Edition* § 5–22, at 388 (cited in note 113). See also *id* at 395 (noting that the *National League of Cities* court erred by protecting "the state in its role as an employer and provider of services and not in its role as a lawmaker and regulator of private conduct").

²⁵⁴ *Alden v Maine*, 119 S Ct 2240, 2264–65 (1999).

²⁵⁵ See, e.g., Bednar and Eskridge, 68 S Cal L Rev at 1465 (cited in note 106) (observing that "[i]f Congress can capriciously foist increased costs onto the states . . . Congress can undermine local capacity for self-government"); Rappaport, 93 Nw U L Rev at 870 (cited in note 122) (arguing that costs of liability may interfere with states' ability to provide services). Professor Rapaczynski goes so far as to argue that protecting the states from federal interference with the internal mechanisms of state government is the most essential aspect of federalism. This is true, he says, because state governments are valuable primarily as an organizational force against federal tyranny. See Rapaczynski, 1985 Supreme Court Review at 389 (cited in note 105). See also *id* at 398–99 (stressing the importance of intermediary institutions generally). There is much validity to this analysis, but states can hardly be effective organizations without retaining the loyalty of their citizens, and this—as Madison knew—depends on their ability to regulate private conduct and provide private benefits.

nity from federal directives that continue to govern private citizens takes a state's interests out of alignment with those of its citizens, thereby undermining a crucial predicate of Madison's political safeguards. Moreover, uncertainty about the extent to which the state will honor basic federal requirements like, for example, wage and hour laws—and the inability to hold the state accountable if it does not—seems likely to breed distrust between state governments and their constituents. Madison cites the opportunity to seek state employment as a critical basis for citizen loyalty,²⁵⁶ for example, but how attractive is such employment likely to be if citizens cannot rely on state adherence to federal employment statutes that have come to form many employees' baseline expectations of fair treatment?

In any event, it is important to remember that sovereign immunity only blurs the enforceability of federal statutes against the states at the behest of private individuals; it does not absolve the states of their obligation to follow federal law.²⁵⁷ Unlike *National League of Cities*, *Alden* does not have the effect of rendering the FLSA unconstitutional as applied to the state government of Maine, and we ordinarily think of law as carrying an obligation to comply wholly apart from the ease with which it may be enforced against us.²⁵⁸ Even if a state wishes to behave as a Holmesian “bad man,” enforcement through a suit by the United States or a suit against a state officer for prospective relief is always lurking in the

See text accompanying notes 199–210. See also Macey, 76 Va L Rev at 269 (cited in note 212) (observing that, under the economic theory of regulation, politicians generally obtain political support in exchange for providing regulation). Rapaczynski admits the importance of a state's extragovernmental activity to maintaining the vitality of political participation at the state level, see Rapaczynski, 1985 Supreme Court Review at 404 (cited in note 105), but the point is equally true of maintaining a state government's organizational strength. In any event, being subject to private lawsuits hardly implicates the internal integrity of state governmental processes to the same degree as the direct regulation of those processes at issue in *National League of Cities* and *Garcia*.

²⁵⁶ Federalist 46, at 294.

²⁵⁷ I say “blurs” enforceability because many states will no doubt choose to waive their immunity to suit under provisions like the FLSA. But the effectiveness of such waivers as a means of preserving public trust will depend on the clarity of the states' waiver scheme.

²⁵⁸ See H. L. A. Hart, *The Concept of Law* 86–88 (Oxford, 1961) (discussing the “internal aspect of rules,” under which an actor obeys the law independently of the likelihood that a sanction will be imposed for noncompliance). One would expect this obligation to weigh especially heavily with a state government, which is itself a law-giving entity with a critical interest in voluntary compliance with state law by its citizens. Compare *Alden v Maine*, 119 S Ct 2240, 2266 (1999) (“We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States.”).

background.²⁵⁹ These means of enforcement ensure that states will never be truly free to allocate their own resources without having to heed federal requirements. And enforcement by the federal government, in particular, is only likely to further undermine citizen loyalty to the extent that state citizens come to look to the federal government as their “protector” against the depredations of state governments.

B. IMMUNITY’S DOWNSIDE

I argued in the preceding section that immunity federalism does little to promote the states’ core interest in maintaining a robust authority over private conduct and benefits. In this sense, the Court’s aggressive development of the immunity model may not be worth the candle. One might, however, view the Court’s efforts to develop a model of immunity federalism as largely unhelpful to state interests without condemning them as counterproductive. It is not obvious, after all, that the Court must choose one model of federalism to the exclusion of the others.²⁶⁰ I have already suggested some reasons to view the Court’s state sovereign immunity jurisprudence as counterproductive. In this section, I want to focus on three more specific ways in which the Court’s pursuit of immunity federalism risks actual harm to state governments.

1. *The opportunity cost of immunity rulings.* The first reason, and the simplest, is that the Court has limited political capital.²⁶¹ As Dean Choper has argued, “the federal judiciary’s ability to persuade the populace and public leaders that it is right and they are wrong is determined by the number and frequency of its attempts

²⁵⁹ See *Alden*, 119 S Ct at 2267 (noting that the states’ immunity does not bar suits by the federal government or officer suits brought by individuals). For a somewhat extreme view, see Rapaczynski, 1985 Supreme Court Review at 346 n 21 (cited in note 105) (asserting that the possibility of suits by the United states or other states renders a state’s sovereign immunity “irrelevant to the problems of federalism”).

²⁶⁰ Vicki Jackson, e.g., has argued that some occasional enforcement of “power” federalism may be necessary to make process federalism meaningful by “cueing” Congress to the existence of limits on its power. See Jackson, 111 Harv L Rev at 2226–27 (cited in note 116) (“[W]hile I agree that the national political process should be the primary mechanism for considering the interests of states, and its judgments should be entitled to substantial deference, the possibility of judicial review may be necessary (or at least helpful) to promote the likelihood that the political process in fact works in this way.”).

²⁶¹ See, e.g., Choper, *Judicial Review and the National Political Process*, at 139 (cited in note 103) (“The people’s reverence and tolerance is not infinite and the Court’s public prestige and institutional capital is exhaustible.”).

to do so, the felt importance of the policies it disapproves, and the perceived substantive correctness of its decisions.”²⁶² There is thus likely to be, at some point, a limit on the Court’s ability to continue striking down federal statutes in the name of states’ rights.²⁶³ To the extent that this limit exists, then the Court’s extended adventure in aggressive enforcement of state sovereign immunity will trade off with its ability to develop a meaningful jurisprudence of process or power federalism. If protecting state authority to regulate private conduct is the key to a viable state/federal balance, then a considered reaffirmation, explanation, or extension of *Lopez* may do more good than another expansion of *Seminole Tribe*.

“Political capital,” of course, is a pretty vague concept. It might be that the Court’s ability to enforce federalism limits is more like muscles than money: it atrophies unless it is exercised regularly.²⁶⁴ The *National League of Cities* story arguably illustrates this phenomenon, in that the Court’s failure to apply the doctrine to check federal power in a series of subsequent cases may have helped lead to the outright rejection of the doctrine in *Garcia*.²⁶⁵ The important point, however, is that the Justices who matter most on these issues tend to think in terms of limited capital and worry about judicial actions that may draw down the reserves.²⁶⁶ Political capital

²⁶² Id.

²⁶³ See also Bednar and Eskridge, 68 S Cal L Rev at 1481 (cited in note 106) (arguing that “the Court assumes institutional risks when it invalidates congressional enactments” and that “the Court is not likely to challenge national political equilibria very often”); Cass R. Sunstein, *Law and Administration after Chevron*, 90 Colum L Rev 2071, 2111 (1990) (“Because judicial invalidation of statutes is troublesome in a constitutional democracy, courts are properly reluctant to enforce the Constitution with the vigor that might be appropriate for institutions having a better electoral pedigree.”).

²⁶⁴ Compare Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U Colo L Rev 849, 860 (1994) (arguing that “[t]here is no reason to believe that a series of controversial decisions under a particular constitutional provision will undermine the Court’s credibility, lead to disobedience of judicial orders, and decrease the judiciary’s power”); Peter M. Shane, *Rights, Remedies and Restraint*, 64 Chi Kent L Rev 531, 546 (1988) (suggesting that, in some cases, the Court may enhance its legitimacy through opposing the political branches). Professor Merritt has argued that the Court cannot, as Dean Choper had urged, see Choper, *Judicial Review and the National Political Process*, at 169 (cited in note 103), save up its political capital for individual rights cases by deferring to the political branches on structural issues. See Merritt, 88 Colum L Rev at 17–18 n 101 (cited in note 107). But it is one thing to say that political capital is not transferable across broad doctrinal categories, and quite another to deny that the Court will be more successful within the area of federalism doctrine if it picks its battles with some care.

²⁶⁵ Compare Van Alstyne, 83 Mich L Rev at 1717 (cited in note 105) (arguing that “[s]everal Justices, respectfully, did not try to make [*National League of Cities*] work”).

²⁶⁶ Compare *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 865–68 (1992) (joint opinion of O’Connor, Kennedy, and Souter) (discussing judicial legitimacy

is thus likely to function as an internal constraint on the Court's willingness repeatedly to confront Congress.

2. *Draconian federal alternatives.* A second problem is that Congress may not be simply willing to give up the federal norms that it had sought to enforce against the states by private lawsuits; instead, Congress may choose to enforce those strictures through means that are even more intrusive into state sovereignty. For instance, while the Court has aggressively limited Congress's ability to subject states to private suits, it has continued to recognize a broad congressional power to condition the grant of federal funds on state compliance with federal directives.²⁶⁷ One can thus readily imagine, in response to cases like *Alden* and *College Savings Bank*, a proliferation of spending conditions designed to require state consent to private suits.²⁶⁸

Congress might require, for example, that states waive their immunity to patent suits, notwithstanding *CSB II*, as a condition attached to research grants to state universities. To the extent that the need to monitor compliance with such conditions creates additional day-to-day federal supervision of state activities (over and above the occasional private lawsuit), the states may be worse off than they were before *CSB II*. Similarly, some in Congress have already proposed amendments to the Patent Act and other federal intellectual property laws that would render state governmental entities ineligible to receive patents or other federal rights unless they first waive sovereign immunity for private lawsuits under those laws.²⁶⁹ The same bill purports to create a new federal cause

in the related context of overruling prior decisions); Adler and Kreimer, 1998 Supreme Court Review at 139 (cited in note 118) (suggesting that the Court will be reluctant to push the anticommandeering doctrine so far as to overrule important federal regulatory regimes).

²⁶⁷ See *South Dakota v. Dole*, 483 US 203 (1987). See also Baker, 95 Colum L Rev at 1918 n 24 (cited in note 107) (noting dramatic growth in federal grants to state and local governments, both in absolute terms and as a proportion of revenue).

²⁶⁸ See Meltzer, 1996 Supreme Court Review at 50–55 (cited in note 17). Indeed, the Court noted that this option remains open to Congress in *Alden* itself. See 119 S Ct at 2267.

²⁶⁹ See the Intellectual Property Protection Restoration Act of 1999, S 1835, 106th Cong, 1st Sess (Oct 29, 1999). The states are already significant users of the patent system, and it seems likely that most would face substantial pressure to acquiesce in the proposed waiver. See *id.* at § 2(a)(14) (finding that “[i]n recent years, states have increasingly elected to avail themselves of the benefits of the Federal intellectual property system by obtaining and enforcing Federal intellectual property rights”).

of action against state governments that, if upheld, would appear to place states in a worse position than under the prior PRCA.²⁷⁰ While such a proposal would not in itself appear to leave the states worse off than before *CSB II*, it might set a damaging precedent for denying the states equal access to federal rights in other contexts.

Similarly, the Court's rejection of *Parden*'s constructive waiver doctrine appears to leave open the option of coercing express waivers through conditional preemption. The Court has held, for example, that Congress may commandeer state legislative and administrative processes if it offers states the alternative of accepting preemptive federal regulation outright.²⁷¹ Although conditional preemption is generally employed where the right to regulate private conduct is at issue, there is no obvious impediment to using preemption to ban certain state activities unless the state accepts a federal condition—such as waiving its sovereign immunity for cases arising out of that activity.²⁷² So, for instance, Congress could prohibit the states from operating a railroad unless they waived their immunity for tort suits brought by injured employees.²⁷³ Or Congress could bar the states from engaging in the sorts of commercial activity at issue in *College Savings Bank* without waiving immunity to intellectual property lawsuits.

Trading constructive waiver for conditional preemption may leave the states worse off because, while *Parden* had become a fairly narrow doctrine, conditional preemption remains quite broad. The version of *Parden* advanced by the government in *College Savings Bank* would have applied only to activities that fell outside the states' core governmental functions.²⁷⁴ But there is no reason to expect Congress always to be similarly restrained when exercising the power of conditional preemption. At best, then, the states' rights benefits of overruling *Parden* are likely illusory; at worst, the

²⁷⁰ Title II of the new bill creates a new remedy for "constitutional violations" that, *inter alia*, appears to shift the burden of proof against the state on some issues. See *id.* at § 201.

²⁷¹ See *FERC v. Mississippi*, 456 US 742 (1982).

²⁷² See, e.g., Katz, 1998 Wis L Rev at 1498 n 167 (cited in note 17) (characterizing the Driver's Privacy Protection Act, 18 USC § 2721(a)(d), in this way).

²⁷³ Compare *Parden v. Terminal Railway*, 377 US 184 (1964).

²⁷⁴ See *CSB I*, 119 S Ct 2219, 2230–31 (1999).

Court's action may spur Congress to act in ways that leave the states less autonomy than before.

Conditional spending, patent grants, and preemption all implicate the unconstitutional conditions doctrine, which holds generally that the government may not condition receipt of a benefit on the surrender of a constitutional right.²⁷⁵ But that doctrine has had remarkably little bite in the federalism context; so long as Congress can identify some minimal nexus between the purpose for which it has granted the benefit and the condition, the Court's opinion in *South Dakota v Dole*²⁷⁶ "offered Congress a seemingly easy end run around any restrictions the Constitution might impose on its ability to regulate the states."²⁷⁷ Some have suggested that closing this loophole is the logical next step on the Court's federalism agenda.²⁷⁸ But this seems unlikely in the near term, given Chief Justice Rehnquist's authorship of *Dole* and his adamant opposition to the unconstitutional conditions doctrine in other contexts.²⁷⁹

Finally, Congress might accept another suggestion offered by the *Alden* Court: a new emphasis on suits brought on behalf of the United States.²⁸⁰ Such suits are currently rare, but one can imagine an attempt to institutionalize the federal suit option by, say, creating a division of the Justice Department devoted to enforcing federal law against the states on behalf of private claimants.²⁸¹ Although the Court in *Alden* rightly pointed out that such

²⁷⁵ See, e.g., *Speiser v Randall*, 357 US 513 (1958). See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv L Rev 1413 (1989). Several scholars have questioned whether there is any such thing as a single, unified "unconstitutional conditions doctrine." See, e.g., Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 BU L Rev 593 (1990). Even if the skeptics are correct, it may be possible to develop workable versions of the doctrine in particular contexts. See Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 Cornell L Rev 1185, 1196-97 (1990).

²⁷⁶ 483 US 203 (1987).

²⁷⁷ Baker, 95 Colum L Rev at 1914 (cited in note 107).

²⁷⁸ *Id.*

²⁷⁹ See, e.g., *Regan v Taxation with Representation*, 461 US 540 (1983).

²⁸⁰ *Alden v Maine*, 119 S Ct 2240, 2267 (1999).

²⁸¹ A somewhat more doubtful option—allowing private parties to bring *qui tam* actions nominally on behalf of the United States—will be tested next term. See *United States ex rel. Stevens v State of Vermont Agency of Natural Resources*, 162 F3d 195 (2d Cir 1998), cert granted, 119 S Ct 2391 (1999). Even if upheld, this option would be of somewhat limited utility for the reason that the United States must be the real party in interest. See *id.* at 202.

suits would “require the exercise of political responsibility for each suit prosecuted against a State,”²⁸² the power of this check would likely decline as such suits became more and more routine. And the development of a federal enforcement bureaucracy whose *raison d’être* is suing state governments would surely be both an irritant in federal-state relations and a step backward for state independence.

3. *Discouraging devolution.* The worst-case scenario is that erosion of the states’ accountability to federal requirements may discourage the further devolution of federal authority to the state level. Rhetorically speaking, it may tend to blunt the force of arguments that power must be returned to more accountable state governments if those governments become, well, less accountable. More importantly, devolutions of authority are frequently accompanied by federal standards that must be observed in the exercise of the ceded power. If Congress must devote substantial federal enforcement resources to policing state compliance with such requirements, instead of employing the cheaper alternative of private attorneys general, that may discourage devolutionary impulses in general.

The Medicaid Act, for example, once required state agencies to reimburse health-care providers for the “reasonable cost” of hospital services actually provided, measured according to federal standards. The 1980 Boren Amendment substantially expanded the states’ power to define reimbursement rates. This devolution of authority was accompanied, however, by the continuing requirement that the rates be reasonable and adequate to meet the providers’ costs, and the Supreme Court held in 1990 that health-care providers were entitled to enforce this requirement directly through private suits under 42 USC § 1983.²⁸³ The Boren Amendment thus demonstrates that Congress may seek to use private lawsuits as an enforcement tool to ensure the states’ exercise of devolved authority conforms to federal standards. And while most such standards might be enforceable through suits for injunctive relief that may not be barred by state sovereign immunity, it is not unheard of to find cooperative federalism schemes that envi-

²⁸² *Alden*, 119 S Ct at 2267.

²⁸³ *Wilder v Virginia Hospital Assn.*, 496 US 498 (1990).

sion private actions for money damages where state programs fail to meet federal requirements.²⁸⁴

Will devolution be less likely if it becomes more difficult to hold states accountable in these ways? The history of the legislative veto may be analogous. That veto is widely thought to have encouraged Congress to delegate power to administrative agencies by providing Congress with a convenient *ex post* means to ensure agency compliance with congressional directives.²⁸⁵ When the Supreme Court struck down the legislative veto, it was feared that Congress would be less willing to delegate such authority²⁸⁶ or would at least be forced to circumscribe its delegations much more narrowly.²⁸⁷ Immunity federalism may present similar disincentives to delegate

²⁸⁴ See, e.g., *Wright v Roanoke Redevelopment and Housing Authority*, 479 US 418 (1987) (upholding damages suit under § 1983 where state public housing authority had charged rents exceeding those permitted by the Federal Housing Act).

²⁸⁵ See, e.g., Louis Fisher, *The Politics of Shared Power: Congress and the Executive* 91 (4th ed 1998). Dissenting from the Court's decision striking down the legislative veto, Justice White described it as "a central means by which Congress secures the accountability of executive and independent agencies." *INS v Chadha*, 462 US 919, 967-68 (1983) (White dissenting). As pressure to delegate greater authority to the executive mounted, "[t]he legislative veto offered the means by which Congress could confer additional authority while preserving its own constitutional role." *Id.* at 969.

²⁸⁶ See, e.g., *Chadha*, 462 US at 968 (White dissenting) (suggesting that, absent the legislative veto, Congress must either give up delegating authority to agencies, or give up any hope of holding those agencies accountable for their work); Tribe, *Second Edition* § 4-3, at 217 (cited in note 113) ("Without a legislative veto, some congressional delegations of power to the executive are probably out of the question.").

²⁸⁷ See Tribe, *Second Edition* § 4-3, at 217 n 21 (cited in note 113) (noting that "the inability to rein in the executive branch by legislative veto may simply induce Congress to devote more care to circumscribing executive conduct *before* the fact through the imposition of nondiscretionary statutory duties"). At the end of the day, *Chadha* does not seem to have made a huge dent in Congress's willingness to delegate authority to administrative agencies. But cf. Sidney A. Shapiro and Robert L. Glickman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 Duke L J 819, 877-78 (observing that a trend toward narrower, more specific delegations to agencies by Congress has coincided with a shift by the Supreme Court away from strict judicial review of agency decision making, but concluding that there may be no causal relationship between these two phenomena). *Chadha's* impact, however, is likely to have been mitigated primarily by the continued availability of functional equivalents to the legislative veto, see Fisher (cited in note 285), at 99-104, as well as other more informal means of congressional oversight, see Jessica Korn, *The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto* 47 (Princeton, 1996) (arguing that "empirical evidence reveals that the legislative veto shortcut authority was superfluous to the informal interbranch contacts and negotiations that serve as the real workhorse of congressional oversight power"). It is far from clear that Congress's means of enforcing limits on devolved authority against state governments would prove as robust if private lawsuits were removed from the mix.

by ceding authority to state governments, especially if it is difficult and costly to enforce the limits of the delegation.

Both these disincentives to devolve authority as well as Congress's use of more draconian enforcement mechanisms might be avoided if the states choose to waive the sovereign immunity for suits under particular federal statutory schemes. The Court has placed control over the scope of state accountability firmly in the hands of state governments, and one should not assume that those governments will be blind to immunity's downside potential. It is possible, at least in theory, to construct statutory regimes where states become eligible to receive devolved authority or avoid Justice Department enforcement actions once they waive their immunity to private lawsuits. This consideration surely mitigates the risks of immunity federalism for state governments to some degree.

I doubt, however, that waiver is a complete answer. Such waivers are unlikely to be uniform; some states may not waive at all, and some waivers may vary in scope. Congress may decide that evaluating such waivers on a case-by-case basis is not worth the trouble, especially if a federally imposed alternative must be established anyway for those states that do not participate. Congress might fear that some states might waive their immunity at the outset, then cancel such waivers later on, especially if a subsequent Congress seemed less likely to retaliate. And Congress might sensibly worry that a Court that has pushed immunity federalism as far as *Alden* might eventually turn its attention to limiting the validity of immunity waivers that seem coerced. All these factors might lead a Congress considering whether to devolve regulatory authority in a particular area to question the credibility of commitments by states to waive their immunity.

The Court will have done little to protect federalism if, in the end, the Court's expansion of state sovereign immunity encourages the development of new federal supervisory bureaucracies and stifles devolutionary impulses at the federal level. And these risks assume a greater importance when compared to immunity federalism's relatively modest benefits. One last risk remains to be considered, however: By aggressively pursuing its immunity agenda, the Court's conservative majority may be undermining prospects for a lasting consensus on federalism doctrine.

VI. FEDERALISM AND DISTRUST

The conservative wing of the Rehnquist Court's impressive string of victories has inspired commentators to speak of a "Federalist revival"²⁸⁸ and even a new "constitutional moment."²⁸⁹ But despite the mounting pile of pro-states precedent, the Court's current direction seems as fragile as the five-vote majority that has prevailed in most of the individual cases.²⁹⁰ The latest round of cases shows signs of continuing the pendulum swings that have characterized the Court's federalism jurisprudence ever since *National League of Cities* in 1976.²⁹¹ If this cycle is to be broken, the Justices must begin to think seriously about the possible ingredients for a stable compromise on federalism issues.

A. "NEVER SAY DIE": DISSENT, REVENGE,
AND PRINCIPLED COMPROMISE

Certainly the dissenting Justices in the state sovereign immunity cases show no signs of accepting *Seminole Tribe* as settled law. Justice Breyer's dissent in *College Savings Bank*, joined by Justices Stevens, Souter, and Ginsburg, announced that "I am not yet ready to adhere to the propositions of law set forth in *Seminole Tribe*."²⁹² Likewise, Justice Stevens's dissent in the first of the present Term's sovereign immunity cases declared on behalf of the same four Justices that "[d]espite my respect for *stare decisis*, I am unwilling to

²⁸⁸ See Jackson, 111 Harv L Rev at 2213 (cited in note 16). See also Baker, 22 Harv J L & Pub Pol at 95 (cited in note 161) (asserting that the Court's recent decisions have "signaled a willingness to resume its too-long-ignored duty to enforce the Constitution's protections for state autonomy").

²⁸⁹ See Mark Tushnet, *Living in a Constitutional Moment? Lopez and Constitutional Theory*, 46 Case W Res L Rev 845, 869-75 (1995).

²⁹⁰ The only cases that have not been 5-4 are *New York v United States*, *Gregory v Ashcroft*, and *City of Boerne v Flores*. In *New York* and *Gregory* Justice Souter joined the majority. See text accompanying notes 294, 302 (discussing Justice Souter's stance). In *City of Boerne*, the split over the continuing validity of the *Smith* decision obscured the precise lineup on the federalism issue.

²⁹¹ One might plausibly trace the pendulum swings further back to *Maryland v Wirtz*, 392 US 183 (1968), which first held that states could be subjected to generally applicable laws like the FLSA, to *NLRB v Jones & Laughlin*, 301 US 1 (1937), which announced a very broad view of the commerce power, or even further. The important point is that we are clearly swinging now, regardless of when we started.

²⁹² *CSB I*, 119 S Ct 2219, 2237 (1999) (Breyer dissenting).

accept *Seminole Tribe* as controlling precedent.”²⁹³ Justice Stevens concluded that *Seminole Tribe* was so far wrong that it “should be opposed whenever the opportunity arises.”²⁹⁴

These sorts of statements by the dissenting Justices are eerily reminiscent of similar statements by the dissenters in *Garcia*. There, Justice O’Connor bitterly protested the Court’s abdication of judicial review of federalism issues, but vowed in conclusion that “this Court will in time again assume its constitutional responsibility.”²⁹⁵ Then-Justice Rehnquist echoed this sentiment, stating that “I am confident [that the *National League of Cities* principle will] in time again command the support of a majority of this Court.”²⁹⁶ Individual Justices dissent all the time, but such vows to “never say die” are less common. And because the cycles of presidential politics tend to ensure (through the appointments process) that ideological majorities on the Court shift back and forth over time, what goes around often tends to come around. In a real sense, the current “federalist revival” is simply a fulfillment of the *Garcia* dissenters’ promise.²⁹⁷

Garcia and *Seminole Tribe* are thus both cases where a five-vote majority of the Court pushed a portion of federalism doctrine all

²⁹³ *Kimel v Florida Board of Regents*, 120 S Ct 631, 654 (2000) (Stevens dissenting).

²⁹⁴ *Id.* at *66. The dissents in *Seminole Tribe* itself struck much the same tone: Justice Stevens, in particular, expressed confidence that “the better reasoning in Justice Souter’s far wiser and far more scholarly opinion will surely be the law one day.” *Seminole Tribe of Florida v Florida*, 517 US 44, 99–100 (1996) (Stevens dissenting). Justice Souter, the principal dissenter in both *Seminole Tribe* and *Alden*, has generally avoided such statements, and may have a higher regard for *stare decisis* than some of his colleagues. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 854 (1992) (joint opinion of O’Connor, Kennedy, and Souter). On the other hand, his *Alden* dissent signaled nonacquiescence by relying primarily on arguments that would require reversal of *Seminole Tribe*, rather than attempting to distinguish the earlier case from *Alden*. See 119 S Ct at 2270–71 (arguing that state sovereign immunity cannot be of constitutional magnitude, whatever its source).

²⁹⁵ *Garcia v San Antonio Metropolitan Transit Auth.*, 469 US 528, 589 (1985) (O’Connor dissenting).

²⁹⁶ *Id.* at 580 (Rehnquist dissenting).

²⁹⁷ There are, in fact, aspects of *Alden* that suggest the Court might reverse *Garcia* if the question were squarely presented. Significantly, the sorts of interference with state autonomy cited by the Court to bar private lawsuits—for example, interference with the ability of state governments to make resource allocation decisions, see 119 S Ct at 2264–65—are exactly the same sorts of interference that the Court cited in *National League of Cities* to warrant a constitutional exemption from the requirements of federal law. See *National League of Cities v Usery*, 426 US 833, 845–52 (1976).

the way (or almost all the way) to one end of a possible spectrum of results—no substantive judicial review of federalism issues, virtually no Congressional abrogation power²⁹⁸—while the defeated minority refused to accept the outcome as legitimate and binding in future cases. The fact that the *Garcia* dissenters were able to make good on their threats suggests that their own victory may be no less secure, with the dissenters of *Seminole Tribe* (and *Lopez* and *Printz* and *Alden*) simply waiting for the appointments process to bring them one more vote.²⁹⁹ No one (except law professors) benefits from such dramatic pendulum shifts in doctrine. Especially where basic questions of constitutional structure are at stake, we are entitled to demand of the Court a little continuity.

In order to build an edifice of federalism doctrine that will stand the test of time (and personnel changes), someone on the Court is going to have to come up with a general federalism framework that can attract at least six or seven votes.³⁰⁰ Unfortunately, no one

²⁹⁸ The Court could, I suppose, have gone even further in *Seminole Tribe* by stating that Congress would lack abrogation power even under Section 5 of the Fourteenth Amendment. But the pre-*Seminole Tribe* middle ground had been that Congress has abrogation power but only subject to an extremely strong clear statement rule. See *Atascadero State Hosp. v. Scanlon*, 473 US 234, 243 (1985). *Seminole Tribe*, of course, took sovereign immunity doctrine far past this compromise position.

Although a thorough analysis of the Section 5 abrogation power is outside the scope of this discussion, the “extreme” position I have postulated does have a certain coherence to recommend it, assuming that *Seminole Tribe* is correct. After all, the text of Section 5 does nothing more than create another enumerated power; nothing in the Amendment suggests that this power is somehow more durable or extensive than, say, the commerce power. See, e.g., Tribe, *Second Edition* § 3-26, at 181 n 28 (cited in note 113) (noting that “all of the Constitution’s affirmative grants of power to Congress should equally be viewed as in derogation of state sovereignty”). Given that Chief Justice Rehnquist authored both *Seminole Tribe* and *Fitzpatrick*, however, it seems unlikely that the present Court will adopt this position. And it may be that Section 5’s grant of power to “enforce”—which the Court has understood to include providing a remedy, see *City of Boerne*, 521 US 507, 519 (1997)—can be read to encompass provision of a damages remedy against state governments without construing Section 5 as a “trump card” over federalism doctrines generally.

²⁹⁹ The future of *College Savings Bank* in the event of another nationalist appointment or two may be more secure. Although the four nationalist justices dissented in both *College Savings Bank* appeals, they appear to have relied solely on *Parden* and the incorrectness of *Seminole Tribe* itself. Neither in *College Savings Bank* nor in *City of Boerne* itself did any of the nationalists question the majority’s analysis under Section 5. No one, for example, has spoken up to defend the broadest of Justice Brennan’s alternative readings of Section 5 in *Katzenbach v. Morgan*, 384 US 641 (1966). See Tribe, 1 *American Constitutional Law* § 5-16, at 954–55 (cited in note 29). It is thus hard to tell how many votes there are for the majority’s narrow reading of Congress’s legislative power to enforce the Reconstruction Amendments.

³⁰⁰ A less numerous coalition might prove equally stable if it were carved out of the Court’s middle, rather than based in one of the ends of the Court’s ideological spectrum.

seems particularly interested in compromise at present. The conservatives seem determined, for the most part, to press their advantage about as far as it can go across a broad range of issues—including the Commerce Clause, anticommandeering, and state sovereign immunity.³⁰¹ And the more nationalist Justices have been no more helpful. It hardly promotes compromise, for example, when Justice Souter asserts in *Lopez* that the attempt to discern *any* limits on federal authority will send the Court down a slippery slope to *Lochner*,³⁰² or when Justice Breyer offers a theory of “substantial effects” that will transparently justify federal regulation of anything at all.³⁰³

Justice Breyer’s dissent in *College Savings Bank* likewise displays a disappointing lack of seriousness about developing a viable federalism doctrine. He suggests that “the details of any particular federalist doctrine” are unimportant and that, because “judicial rules that would allocate power are often far too broad,” Congress should instead be trusted to determine the proper allocation of power.³⁰⁴ And the only legitimate judicially enforceable federalism

³⁰¹ *Coeur d’Alene* is both a disturbing and reassuring example in this regard. Disturbing, because Justice Kennedy and the Chief Justice very aggressively sought to use the case as a vehicle to undermine *Ex parte Young*. See *Idaho v. Coeur d’Alene Tribe*, 521 US 261, 274 (1997) (plurality opinion) (suggesting that *Young*’s applicability should turn on a balancing test involving, inter alia, whether a state forum is available to hear the claim). See also Vicki Jackson, *Coeur d’Alene, Federal Courts and the Supremacy of Federal Law: The Competing Paradigms of Chief Justices Marshall and Rehnquist*, 15 Const Comm 301, 314 (1998). Reassuring, because Justice O’Connor and the remaining members of the conservative majority (Justices Scalia and Thomas) refused to go that far. *Coeur d’Alene*, 521 US at 291 (O’Connor concurring in the judgment). See also Katz, 1998 Wis L Rev at 1484 n 86 (cited in note 17) (discussing the *Coeur d’Alene* opinions).

³⁰² *United States v. Lopez*, 514 US 549, 605–09 (1995) (Souter dissenting). The roots of Justice Souter’s unwillingness to acknowledge any limits on the commerce power may lie in the concern that the federalism limits articulated by the Court in other contexts have not been disciplined by intellectual rigor. See Young, *Jurisprudence of Structure*, 41 Wm & Mary L Rev (cited in note 97) (arguing that the Court’s use of the common law background to demonstrate the scope and limits of state sovereign immunity may be legitimate in theory but insufficiently nuanced in practice). If one doubts that any principle can be found that will adequately constrain judges in administering Commerce Clause limits, one plausible response is to disavow the enterprise of enforcing such limits at all. But this response seems to assume that danger lies in only one direction: excessive and unfettered judicial invalidation of federal action. Surely total judicial abdication carries risks as well. And the idea that federalism limits on federal activity should be abandoned altogether seems unlikely to attract any sort of consensus on the Court in the foreseeable future.

³⁰³ *Lopez*, 514 US at 619–23 (Breyer dissenting). See also text accompanying note 127 (demonstrating how Justice Breyer’s approach would support federal regulation of family law—the one area which Justice Breyer asserted was clearly outside the reach of federal power).

³⁰⁴ *CSB I*, 119 S Ct 2219, 2239 (1999) (Breyer dissenting). But see Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv L Rev 405, 446 (1989) (“The basic case

principle that he can think of is the dormant Commerce Clause, which of course limits the states' authority, not Congress's.³⁰⁵ At this point, one would not be surprised to find a basic problem of distrust: The nationalist Justices may feel that any concession will simply snowball against them down the line, while the conservative Justices are equally unwilling to concede anything to national power until the nationalists accept the concept of limited government.³⁰⁶

How to break this impasse? The problem would not exist if these issues were not extremely difficult, and I am not so presumptuous as to offer a general and comprehensive framework of federalism doctrines here. I can only sketch the outlines of a possible middle ground, drawing on the Framers' political theory of dual sovereignty. As Justice O'Connor explained in *Gregory*, this theory begins "with the axiom that . . . the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause."³⁰⁷ The model also contemplates, however, that "[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States."³⁰⁸ Neither the state nor the federal sphere

for judicial review depends on the proposition that foxes should not guard henhouses." In fairness, Justice Breyer's view of deference to Congress's need for flexibility does not appear to foreclose a set of process federalism interpretive presumptions that effectively raise the costs of shifting power away from the states. See note 191 and accompanying text (discussing Justice Breyer's position in *Iowa Utilities Board*).

³⁰⁵ *CSB I*, 119 S Ct at 2234 (Breyer dissenting). Justice Stevens likewise signaled a complete retreat to *Garcia*'s minimalist version of process federalism this term. See *Kimel v Florida Bd of Regents*, 120 S Ct 631, 651–52 (2000) (Stevens dissenting). Such rhetoric suggests that the nationalist justices may refuse to accept the stare decisis legitimacy not only of *Seminole Tribe*, but of *New York*, *Printz*, and *Lopez* as well.

³⁰⁶ The hardening of the battle lines is evident in this Term's decision in *Kimel*. See 120 S Ct at 643 (Justice O'Connor, observing that "the present dissenters' refusal to accept the validity and natural import of decisions like *Hans*, rendered over a full century ago by this Court, makes it difficult to engage in additional meaningful debate on the place of state sovereign immunity in the Constitution"). While Justice O'Connors' frustration with the dissenters' nonacquiescence is understandable, her observation betrays a continuing failure to understand that the dissenters' quarrel is not so much with *Hans* as with *Seminole Tribe*'s extension of *Hans* into the abrogation context. See *Seminole Tribe of Florida v Florida*, 517 US 44, 130 (1996) (Souter dissenting) (stating that "I would not, as a matter of stare decisis, overrule *Hans* today," but arguing against "taking *Hans* the further step of investing its rule with constitutional inviolability against the considered judgment of Congress to abrogate it").

³⁰⁷ *Gregory v Ashcroft*, 501 US 452, 457 (1991) (quoting *Tafflin v Levitt*, 493 US 455, 458 (1990)).

³⁰⁸ *Id* at 458.

may be neglected or overrun if the essential balance is to survive. As Justice O'Connor concluded, "[t]hese twin powers [the states and the federal government] will act as mutual restraints only if both are credible."³⁰⁹

Dual sovereignty thus provides a basis not only for protecting some sphere of state activity from federal interference, but also for rejecting claims for states' rights that intrude upon the federal sphere. Justice Kennedy, for example, relied on the dual sovereignty idea in *Term Limits*, his one defection from the pro-states majority. There, Justice Kennedy argued that dual sovereignty theory means that both state and national governments have their own direct and unmediated relationship with the people, with the necessary implication being that states may not interfere with the relationship between citizens and their federal representatives by imposing term limits.³¹⁰ Similarly, Justice Souter relied on the political theory of dual sovereignty in both *Seminole Tribe* and *Alden* to demonstrate why a state government could not possibly be "sovereign" as against a claim based on federal law.³¹¹

Gregory, *Term Limits*, and *Seminole Tribe* demonstrate not only that dual sovereignty theory provides a basis for upholding some federal actions while striking others, but also that this theory stands a good chance of attracting the centrist Justices necessary to any middle-ground coalition.³¹² Such a middle ground would

³⁰⁹ Id at 459.

³¹⁰ See *U.S. Term Limits, Inc. v Thornton*, 514 US 779, 838–41 (1995) (Kennedy concurring). The dual sovereignty theory, as elaborated in *Term Limits*, does create a certain tension with the process federalism of *Garcia*. *Garcia* relied heavily on the view that members of Congress represent state governments, not just people in the states. See *Garcia v San Antonio Metropolitan Transit Auth.*, 469 US 528, 550–54 (1985). *Term Limits*, on the other hand, rather clearly takes the position that state governments are not party to the relationship between citizens and their federal representatives. See 514 US at 803–04, 837–38 (majority opinion). But *Garcia*'s assumption was probably somewhat unrealistic anyway, see sources cited in notes 105, 107; in the end, the important aspect of process federalism is probably its tendency to force federal lawmaking into channels that reduce the overall output of federal law. See text accompanying notes 114–21.

³¹¹ *Seminole Tribe of Florida v Florida*, 517 US 44, 150–55 (1996) (Souter dissenting); *Alden v Maine*, 119 S Ct 2240, 2287–88 (1999) (Souter dissenting). Justice Breyer's dissent in *CSB I* likewise invoked dual sovereignty. See 119 S Ct at 2238 (Breyer dissenting).

³¹² Federalism may thus be an unusual counterexample to Cass Sunstein's theory of incompletely theorized agreements in the sense that, while the conservative majority that generally agrees on pro-states results may have to rely on such agreements, see text accompanying notes 166–72, a different, more centrist coalition might be able to fashion a compromise that begins with broad agreement on theory. For a somewhat related point, see Richard H. Fallon, *How to Choose a Constitutional Theory*, 87 Cal L Rev 535, 565–66 (1999) (suggesting that sometimes the more abstracted a constitutional theory is from particular

probably need to accept at least the following two principles: (1) the Constitution imposes some federalism-based limits on the permissible scope or nature of federal activity; but (2) the states are not sovereign as against any exercise of federal power within the scope of authority delegated by the Constitution.

The hard part, of course, will be agreeing on the nature of the limits entailed by the first of these principles, but two points are worth noting. First, these limits need not be in the nature of subject-matter “enclaves” which the federal government may not regulate. As I noted above, “power” federalism includes other tools—such as requiring a close connection to an enumerated federal power or some sort of argument for why federal action is necessary to fill a gap the states cannot fill on their own—that avoid the problem of defining exclusive enclaves.³¹³ And a strong version of process federalism might even suffice to guarantee that, practically speaking, a robust state sphere will remain, without the need to define its contours *ex ante*.

The second point is that merely accepting the proposition that federalism imposes some judicially enforceable limits on federal power—even defined in very general terms—forecloses the position taken by the nationalist Justices in *Lopez*. Such a concession would force those Justices to devote their considerable talents to the enterprise of developing workable federalism doctrines, rather than denying that such doctrines exist. And that would surely be an important first step in the development of a lasting federalism.

One might object that the very idea of “compromise” misunderstands the judicial function, which is to find “right answers” rather than cut deals.³¹⁴ But neither side’s position on these issues seems rooted in intractable principle. Justice Souter’s opposition to virtually all judicially enforceable limits on Congress’s power, for example, does not appear to derive from a conviction that, in principle, the Constitution simply contains no such limits. Rather, he has emphasized prudential concerns about the judiciary’s ability to for-

results, the greater is the likelihood that the theory may facilitate agreement—or at least good faith debate—on more specific issues).

³¹³ See text accompanying notes 130–39. See also Kramer, 47 Vand L Rev at 1498 (cited in note 105) (noting that “just because it’s no longer possible to maintain a *fixed* domain of exclusive state jurisdiction it’s not necessarily impossible to maintain a *fluid* one”).

³¹⁴ See, e.g., Ronald R. Dworkin, *Hard Cases*, 88 Harv L Rev 1057 (1975) (arguing that judges can and must find “right answers” in hard cases).

mulate and enforce workable rules.³¹⁵ As Justice Souter has noted in other contexts, however, such concerns need not necessarily bar incremental, common law efforts to fashion administrable limits on government power.³¹⁶

Similarly, the most persuasive argument for the conservative majority in cases like *Printz* and *Alden* is not so much that text, history, or political theory dictated the Court's conclusions,³¹⁷ but rather that preservation of functional balance in our present constitutional environment requires such doctrines.³¹⁸ The ultimate criterion, to return to Professor Fried's phrase, is that these doctrines "make sense."³¹⁹ To the extent that these doctrines—and *Alden* in particular—fail to protect the states' core interests, there ought not to be any principled objection to abandoning or limiting them.

B. THE CLOSING WINDOW OF OPPORTUNITY

The next act in this drama will come sooner rather than later. Although portentous grants of certiorari do not always lead to significant rulings, the 1999 Term has the makings of the most important year for federalism in recent memory. The Court has taken no less than eight cases with important implications for the balance of power between the nation and the states. And because

³¹⁵ See *United States v Lopez*, 514 US 549, 604–07 (Souter dissenting). The *Lopez* dissent thus differs in kind from Justice Souter's more narrow opposition to state sovereign immunity, which is clearly rooted in a conviction that *Seminole Tribe* arrived at the "wrong answer" to a question which constitutional text, history, and theory determinately resolves.

³¹⁶ See *Washington v Glucksberg*, 521 US 702, 767–73 (1997) (Souter concurring in the judgment).

³¹⁷ I can only assert this point here. A satisfactory demonstration would require a comprehensive review of the merits in these cases that is far beyond the scope of this article. In brief, I think that the historical arguments in *Printz* are close, and therefore most persuasive when combined with a translation-type argument. In *Alden*, I find Justice Souter's arguments on the text, history, and theory wholly persuasive. See Young, *Jurisprudence of Structure*, 41 Wm & Mary L Rev (cited in note 97).

³¹⁸ Compare Lawrence Lessig, *Translating Federalism: United States v Lopez*, 1995 Supreme Court Review 125 (arguing that *Lopez* itself is most defensible as an effort to "translate" the presuppositions of the Framers' constitutional regime into the modern context, rather than as a compelled reading of the Constitution's text). The other plausible argument for *Alden*'s result is that it is largely dictated by the Court's prior holding in *Seminole Tribe*. But this sort of common law elaboration almost always implicates a question of judgment as to whether the next step "makes sense."

³¹⁹ See text accompanying note 96.

the cases on the docket implicate a variety of doctrinal niches, they offer a significant opportunity to choose among federalism strategies.

The Court has two Eleventh Amendment cases, one of which has just come down as this article goes to press. In *Kimel v Florida Board of Regents*,³²⁰ the Court held that the Age Discrimination in Employment Act did not validly abrogate the states' sovereign immunity pursuant to Section 5 of the Fourteenth Amendment.³²¹ Like *College Savings Bank*, *Kimel* primarily implicates the limits of the Section 5 power and is therefore best considered a power federalism case. *United States ex rel. Stevens v Vermont Agency of Natural Resources*,³²² on the other hand, concerns the scope of the exception to state sovereign immunity for suits by the United States. In *Stevens*, the Second Circuit held that *qui tam* suits brought by private plaintiffs in the name of the United States under the False Claims Act³²³ are not subject to the Eleventh Amendment bar. *Stevens* thus falls squarely within the immunity category.

Two other cases primarily implicate an immunity model, although they do not involve sovereign immunity from suit. In *Condon v Reno*,³²⁴ the Fourth Circuit struck down the Drivers Privacy Protection Act (DPPA),³²⁵ which restricted state governments from releasing drivers license information concerning private individuals. The Fourth Circuit held that the DPPA violated the anticommandeering rule not because it required the states to regulate third parties—which would have implicated both immunity and process federalism concerns³²⁶—but because the law regulates only the

³²⁰ 120 S Ct 631 (Jan 11, 2000), affirming 139 F3d 1426 (11th Cir 1998).

³²¹ See 29 USC § 630(b)(2) (including state governments within the definition of "employer" covered by the statute). In *Kimel*, one judge held that Congress had failed clearly to state its intent to abrogate the states' immunity, 139 F3d at 1433 (opinion of Edmondson), another found that Congress *had* spoken clearly and that the abrogation was valid, see *id* at 1436–40 (Hatchett concurring in part and dissenting in part), while the third judge avoided the clear statement issue by holding that in any event Congress lacked power under Section 5 to abrogate state sovereign immunity in this context, see *id* at 1445 (Cox concurring in part and dissenting in part).

³²² 162 F3d 195 (2d Cir 1998), cert granted, 119 S Ct 2391 (1999).

³²³ 31 USC § 3729 et seq.

³²⁴ 155 F3d 453 (4th Cir 1998), cert granted, 119 S Ct 1753 (1999).

³²⁵ 18 USC §§ 2721–25.

³²⁶ See text accompanying notes 152–60.

behavior of state governments.³²⁷ *Condon* is thus exclusively concerned with the contours of Congress's authority to subject the states to federal directives. As this article goes to press, the Court has unanimously rejected the Fourth Circuit's position and upheld Congress's ability to regulate state governments in this way.³²⁸

*Williams v Taylor*³²⁹ presents a different facet of immunity federalism: the extent to which state courts may be held accountable to federal constitutional norms through the federal writ of habeas corpus. Under Congress's amendments to the federal habeas statute in 1996, a federal court may grant habeas relief on a claim previously adjudicated on the merits in state court only if the state court's decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."³³⁰ The precise meaning of this new language is unclear, and the Supreme Court's initial construction of it in *Williams* may importantly affect the ability of federal courts to hold state tribunals accountable to federal norms.³³¹

Two of this Term's cases have critical implications for power federalism insofar as they explore the limits of the Court's holding in *Lopez*. *United States v Jones*³³² concerns the federal arson statute,³³³ which two circuits have held may not constitutionally be applied to arson of residential property.³³⁴ Because the arson stat-

³²⁷ See *Condon*, 155 F3d at 460–63. See also Jackson, 111 Harv L Rev at 2205 (cited in note 17) (observing that the DPPA does not "'commandeer' in the sense of requiring state regulation of nongovernmental actors").

³²⁸ *Reno v Condon*, 120 S Ct 666 (Jan 12, 2000). The Court purported to avoid the question whether Congress may regulate state governments without passing laws of "general applicability" that also regulate private parties, as it found at least some private parties covered by the DPPA. See *id.* at 672. But the Court's view of what constituted a "generally applicable" law in *Condon* seems sufficiently capacious to largely obviate the broader question. See *id.*

³²⁹ 189 F3d 421 (4th Cir), cert granted, 120 S Ct 395 (1999).

³³⁰ 28 USC § 2254(d).

³³¹ See James S. Liebman and William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum L Rev 695, 866–84 (1998) (discussing § 2254(d)).

³³² 178 F3d 479 (7th Cir), cert granted, 120 S Ct 494 (1999).

³³³ 18 USC § 844(i).

³³⁴ See *United States v Pappadopoulos*, 64 F3d 522 (9th Cir 1995); *United States v Denali*, 73 F3d 328 (11th Cir), modified on other grounds, 90 F3d 444 (1996). In *Jones*, Judge Easterbrook upheld the statute's application to residential property. See 178 F3d at 481.

ute requires proof of a jurisdictional nexus to interstate commerce—that is, “that the torched property was ‘used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce’”³³⁵—*Jones* will require the Court to explore the extent of the connection to interstate commerce that the Constitution requires.

A different aspect of *Lopez* is at issue in *Brzonkala v Virginia Polytechnic Institute*,³³⁶ which concerns the Violence Against Women Act’s (VAWA)³³⁷ provision of a federal cause of action for women injured by “bias-motivated violence.” Unlike the Gun Free School Zones Act struck down in *Lopez*, the VAWA was supported by extensive hearings and formal findings by Congress on the impact of gender-motivated violence on interstate commerce; as in *Lopez*, however, the object of federal regulation is not commercial activity. *Brzonkala* will thus test the relative importance of these different aspects of *Lopez*’s analysis.

The Fourth Circuit also held in *Brzonkala* that the VAWA exceeded Congress’s power to provide a remedy for gender discrimination under Section 5 of the Fourteenth Amendment.³³⁸ *Brzonkala* and *Kimel* thus both offer important opportunities to further develop the Section 5 inquiry under *City of Boerne*. *Brzonkala* involves both the ability of Congress to use Section 5 to regulate private conduct³³⁹—a critical aspect of power federalism—and the proportionality aspect of *City of Boerne*.³⁴⁰ *Kimel*, on the other hand, has already limited Congress’s ability to provide remedies for discrimination against nonsuspect classes.³⁴¹

Two significant preemption cases provide another opportunity for the Court to exploit the largely untapped potential of process federalism. *Geier v American Honda Motor Co.*³⁴² involves the preemption of state common law tort claims by the National Traffic

³³⁵ *Jones*, 178 F3d at 480 (quoting 18 USC § 844(i)).

³³⁶ 169 F3d 820 (4th Cir 1999) (en banc), cert granted, 1999 US LEXIS 4745.

³³⁷ 42 USC § 13981.

³³⁸ See 169 F3d at 913–14 (Mozt dissenting).

³³⁹ See *id.* at 862–80.

³⁴⁰ See *id.* at 883–89.

³⁴¹ 2000 US LEXIS at *34–53.

³⁴² 166 F3d 1236 (DC Cir), cert granted, 120 S Ct 33 (1999).

and Motor Vehicle Safety Act and its accompanying regulations.³⁴³ At its heart, *Geier* implicates the manner in which the presumption against preemption should be applied to conflict preemption, where the issue is not the clarity of statutory language but the degree of interference with federal policy.³⁴⁴ Another important preemption issue arises in *International Ass'n of Independent Tanker Owners (Intertanko) v Locke*.³⁴⁵ There, the Ninth Circuit held that neither the federal Oil Pollution Act nor various international navigation treaties preempted, in most respects, the State of Washington's ability to regulate operation of oil tankers in state waters.³⁴⁶ Importantly, the Ninth Circuit also held that the Coast Guard exceeded its delegated authority by issuing regulations that purported to preempt the state mandates.³⁴⁷ This latter holding raises a long-standing process federalism issue concerning Congress's ability to short circuit the Article I limits on its power by delegating preemptive authority to federal agencies.³⁴⁸

A final important case concerns not the scope of federal regulatory authority, but rather the implied preemption of state regulatory authority touching on foreign affairs. In *National Foreign Trade Council v Natsios*,³⁴⁹ the First Circuit struck down a Massachusetts law restricting the ability of state agencies to purchase goods or services doing business with the foreign state of Burma.³⁵⁰ The law was enacted as an expression of the state's disapproval of the human rights conditions under Burma's new government.³⁵¹ The First Circuit's opinion has a certain "kitchen sink" quality to it—relying alternatively on the federal foreign affairs power, the

³⁴³ See 15 USC § 1381 et seq.; 49 CFR § 571.208 (1997).

³⁴⁴ See 166 F3d at 1241–43 (holding that state common law claims were impliedly preempted despite the court's earlier holding that the presumption against preemption barred a finding of *express* preemption by the statutory language).

³⁴⁵ 148 F3d 1053 (9th Cir 1998), cert granted, 120 S Ct 33 (1999).

³⁴⁶ See *id* at 1060–67.

³⁴⁷ See *id* at 1067–68.

³⁴⁸ See generally Marshall, 87 Geo L J at 264 (cited in note 17) (noting an unresolved conflict between the presumption against preemption and the *Chevron* deference ordinarily accorded agency interpretations of law).

³⁴⁹ 181 F3d 38 (1st Cir), cert granted, 120 S Ct 525 (1999).

³⁵⁰ See Mass Gen Laws ch 7, §§ 22G–22M, 40F½ (West Supp 1998).

³⁵¹ See 181 F3d at 46–47.

Foreign Commerce Clause, and preemption under the Federal Burma Law³⁵²—and it is accordingly difficult to predict what doctrinal path the Supreme Court’s resolution will take. It seems likely, however, that as the categorical distinction between “foreign” and “domestic” affairs continues to collapse,³⁵³ decisions like *Natsios* will take an increasingly important place in the development of federalism doctrine.

Taken together, these varied federalism cases offer the Court an opportunity to choose among federalism models. Although the Court certainly could rule for the states in all the suits, I have suggested above that this strategy may not be sustainable forever, and that immunity rulings may in any event be counterproductive in terms of the Court’s political capital and Congress’s likely reactions. Such a strategy may also be counterproductive in the sense that a refusal by the conservative majority to moderate its positions on some federalism issues may harden the nationalist justices’ views across the board. This Term will thus offer an important chance for the Court’s conservative majority to realign its priorities and pursue a more lasting synthesis.

The results in *Kimel* and *Condon*, both decided just as this article goes to press, seem to offer at least some hope of establishing a sensible set of priorities. The Court upheld relatively strict limits on the Section 5 power in *Kimel*,³⁵⁴ while rejecting invitations to formulate a broad new form of immunity doctrine in *Condon*.³⁵⁵ And the ability of all nine Justices to agree in *Condon* suggests that consensus is not entirely out of the question, despite the frustration evident on both sides in *Kimel*.³⁵⁶

This term may be a particularly good time—and perhaps the last good time for a while—to think about compromise. Both the states’ rights and nationalist camps surely appreciate that the situation is precarious; depending on the outcome of the next presidential election, either side could find itself with a fairly firm majority within the next several years. The impending election thus casts

³⁵² See *id.* at 49–61 (foreign affairs power), 61–71 (Foreign Commerce Clause), 71–77 (federal Burma Law).

³⁵³ See the discussion at text accompanying notes 128–29.

³⁵⁴ See 120 S. Ct. at 645–50.

³⁵⁵ See *id.* at 672.

³⁵⁶ See text accompanying notes 293–94 and note 306.

a sort of Rawlsian “veil of ignorance” over the future voting strength of each ideological bloc.³⁵⁷ This ought to create an incentive to build a consensus that can survive significant personnel changes now, rather than wait in the hope that one’s own side will soon have (or will keep) the strength to simply impose its will. But the opportunity may be fleeting; once the next president becomes a known quantity, the side likely to receive reinforcements will have little incentive to be reasonable.

VII. CONCLUSION

Ever since the first controversies over payment of state Revolutionary War debts, state sovereign immunity has been something of an odd world apart from the rest of constitutional law. Unfortunately, the Rehnquist Court’s preoccupation with this world has gone awry in such a way as to threaten the current majority’s worthy project of restoring some balance to the relationship between the states and the nation. That project, as the Court has already recognized this Term in *Condon*,³⁵⁸ will not be threatened if the states fail to prevail in every single federalism case that comes before the Court. It *will* be undermined, however, if the bitter disputes over state sovereign immunity distort the methodology with which the Court approaches federalism cases, obscure the central importance of state interests that simply may not be implicated in the immunity cases, or prevent the compromises necessary to formulate a stable set of federalism doctrines that will last well into the new century.

³⁵⁷ See John Rawls, *A Theory of Justice* 136–42 (Belknap, 1971).

³⁵⁸ See text accompanying notes 324–28, 355–56.